BEFORE THE

ILLINOIS COMMERCE COMMISSION

In the Matter of	)	
	)	
Petition for Arbitration of XO ILLINOIS,	)	
INC. Of an Amendment to an	)	Docket No. 04-0371
Interconnection Agreement with SBC	)	
ILLINOIS, INC. Pursuant to Section 252b)	)	
of the Communications Act of 1934, as	)	
Amended	)	

SBC ILLINOIS' INITIAL BRIEF

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SBC ILLINOIS' OPENING BRIEF

Illinois Bell Telephone Company, d/b/a SBC Illinois ("SBC Illinois"), by its attorneys, hereby submits its initial brief. While SBC Illinois contends that this entire arbitration cannot properly be conducted under section 252(b) of the 1996 Act, as explained in SBC Illinois' Motion to Dismiss, SBC Illinois will not repeat those arguments here. Without waiving any of those arguments, this brief is premised on the (incorrect) assumption that this proceeding is properly being conducted under section 252(b) of the 1996 Act. Each of the disputed issues that the Commission must resolve are addressed below.[1]

ISSUE XO-1: Routine Network Modifications

The *TRO* requires ILECs to undertake certain "routine network modification" activities for competing carriers. The parties have several disagreements regarding the contract provisions governing routine network modifications.

The first concerns pricing. The *TRO* states unequivocally that the FCC's "pricing rules provide incumbent LECs with the opportunity to recover the cost of . . . routine network modifications." *TRO*, ¶ 640. XO's proposal in Section 3.16.1 to deny SBC Illinois cost recovery for routine network modifications "at no additional cost or charge" where a transmission facility has already been constructed is therefore unlawful. Even if a facility already exists, SBC Illinois is entitled to recover its costs of *modifying* that facility.

Indeed, XO later acknowledges this right to cost recovery by proposing language in Section 3.16.1 stating that SBC Illinois "will recover the costs of routine network modifications in its monthly recurring rates." The problem with that language, however, is that the category of

[1] Attachment 1 hereto contains a summary of SBC Illinois' position on each disputed issue.

"routine network modifications" could include various types of work, and XO has made no attempt to show that the costs of any or all such modifications are already included in SBC Illinois' unbundled loop prices. Nor could XO make such a showing. For example, one type of routine network modification is adding a doubler or repeater to a loop to enhance voice transmission (as both SBC Illinois and XO note in Section 3.16.2). The costs of adding such devices to a loop are not included in TELRIC-based loop costs, because in a forward-looking network loops would not have such devices on them. *UNE Remand Order*, ¶193. Since such devices would not exist in a forward-looking TELRIC network, costs associated with them are not included in the TELRIC-based UNE loop price. Nevertheless, when a CLEC requests a loop that requires such devices to be added, the FCC has made clear that the CLEC is obligated to pay the ILEC for that work. *Id.*; *First Report and Order*, ¶ 382; 47 C.F.R. § 51.319(a)(1)(iii)(B).

Of course, the disputed language in Sections 3.16.2 and 3.16.3 also lists a variety of other types of network modifications, and XO makes the blanket claim that the costs of all such modifications (even those not listed) are already recovered in existing UNE loop prices. As with doublers and repeaters, the costs for some of these items would not be included in TELRIC-based prices, while others might or might not be included depending on the nature of the work requested (the list is long and the types of work are varied). This is why SBC Illinois proposes in Section 3.16.1 that pricing for routine network modifications be addressed on an individual case basis ("ICB"). Contrary to XO's theory, SBC Illinois has no interest in double-recovering its costs, and use of ICB pricing will allow it to determine whether the costs associated with any particular XO request are or are not already included in the UNE loop price. By contrast, XO's

unsupported, blanket assumption[2] that all such costs are already recovered in loop prices is clearly wrong (as the repeater example shows) and should be rejected, as it would deny SBC Illinois any recovery of costs the FCC has held it is entitled to recover.

Furthermore, XO has failed to propose any mechanism to adjust SBC Illinois' monthly recurring rates to include such costs. As XO admits, adjustments to rates must be made through "UNE costing proceeding[s] at the Commission and not through this arbitration." Thus, in this arbitration the Commission should adopt SBC Illinois' proposed language, which requires XO to compensate SBC Illinois on an individual case basis for the routine network modification SBC Illinois performs at XO's request, because the costs of such activities are not automatically always recovered in SBC Illinois' other rates. In similar circumstances, the FCC's Wireline Competition Bureau ordered the parties to an arbitration to set prices on an individual case basis, and the same result is appropriate here.[3]

Second, XO objects to SBC Illinois' proposed contract language in Section 3.16.1 stating that routine network modifications "do not include the construction of a new loop, or the installation of new aerial or buried cable." XO suggests instead that SBC Illinois should be required to trench or pull cable to replace existing facilities. XO's suggestion is directly contrary to the *TRO*. The FCC flatly stated that ILECs are not required to "build[] a loop from scratch by trenching or pulling cable," and are not "required to trench or place new cables for a requesting carrier . . . whether serving an existing customer or along a new route." *TRO*, ¶¶ 636, 639. The

[2] The *only* "support" XO offers for its claim is the allegation that SBC used to perform "these functions" for CLECs until an internal policy change. XO provides no details, and SBC Illinois has no idea what policy change XO is referring to. XO may be referring to a particular dispute with SBC *Texas* a few years ago, but that has absolutely no bearing here in Illinois.

[3] Memorandum Opinion and Order, *Petition of Cavalier Telephone LLC*, WC Docket No. 02-359, DA 03-3947 (rel. Dec. 12, 2003).

FCC did not make any exception for the replacement of existing facilities. Moreover, trenching or pulling cable to construct a new facility cannot reasonably be deemed a "modification" of an existing facility, but rather defies the plain meaning of the term "modification."

Third, the parties disagree concerning certain language in Section 3.16.2 defining routine network modifications. XO proposes to list "adding electronics to available wire or fiber facilities to fill an order for an unbundled DS1 circuit; cross-connecting the common equipment to the wire or fiber facility running to the end user; [and] terminating a DS1 loop to the appropriate NID" as routine network modifications that SBC Illinois must perform. XO's language is unclear and, if adopted, would only lead to disputes over the meaning of "electronics." *See TRO*, ¶ 634 ("Due to the continually evolving and dynamic nature of telecommunications networks, however, we reject the argument that our rule should list the precise electronics that the incumbent LEC must add to the loop in order to transform a DS0 voice-grade loop to an unbundled DS1 loop.") The *TRO* merely requires SBC Illinois to "perform all loop modification activities that it performs for its own customers" (*id.*), which is what SBC Illinois' proposed language says. SBC Ill. Section 3.16.2 ("attaching electronic and other equipment that the incumbent LEC ordinarily attaches to a loop to activate such loop for its own customers.") The other tasks listed by XO regarding cross-connects and terminating a DS1 loop to the appropriate NID do not appear anywhere in the *TRO*'s discussion of ordinary network modifications. XO has provided no evidence that any of these activities constitute routine network modifications. SBC Illinois' proposed language, by contrast, covers all the types of modifications discussed by the FCC, in language consistent with the FCC's word and intent, and should be adopted.

Fourth, XO also objects to SBC Illinois' proposed language in Section 3.16.3 stating that routine network modifications "do not include the installation of fiber or the provision of electronics for the purpose of lighting dark fiber (i.e. optronics)." Instead, XO proposes language in that same Section requiring SBC Illinois to "enable CLECs to have light continuity and functional signal carriage across both ends of a dark fiber transport or loop facility." XO's language is unsupported by the *TRO*, and its objection to SBC Illinois' language is without merit.

XO has not articulated any objection to language making clear that "the installation of fiber" is not a routine network modification. SBC Ill. Section 3.16.3. Nor could it. As noted above, the FCC made clear that ILECs are not "required to . . . place new cables" or "build[] a loop," and this directive applies equally to dark fiber. *TRO*, ¶ 639.

Nor are ILECs required to provide optronics to light dark fiber. *See* XO Section 3.16.3. That would make no sense. If ILECs were required to provide optronics, then they would be providing "lit" fiber, not "dark" fiber, to requesting carriers. And the FCC expressly held that ILECs are only required to unbundle *dark* fiber, because requesting carriers "are not impaired by the costs of collocation and electronics necessary to activate dark fiber." *TRO*, ¶ 381. Thus, "[d]ark fiber transport is activated *by competing carriers* using *self-provided* optronic equipment." *Id.* (emphasis added). The FCC did not leave any room for doubt about which party is responsible for providing optronics: "Users of unbundled dark fiber loops, similar to users of dark fiber transport, provide the electronic equipment necessary to activate the dark fiber strands to provide services" (*id.*, ¶ 311); and "carriers that request dark fiber transport . . . must purchase and deploy necessary electronics." *Id.* ¶ 382.

Moreover, the FCC's actual routine network modification rules make clear that ILECs are not required to provide optronics to light dark fiber. FCC Rule 319(e)(5)[4] states that routine network modifications "include activities needed to *enable a requesting telecommunications carrier to light a dark fiber* transport facility." (Emphasis added). In other words, XO itself is responsible for lighting any unbundled dark fiber it leases from SBC Illinois. SBC Illinois is responsible only for performing those routine network modifications that are necessary to "enable" XO to light a dark fiber, such as splicing the existing dark fiber.

Fifth, XO proposes contract language that would subject the provisioning of network elements that require routine network modifications to the standard provisioning intervals and remedy payments. *See* XO Section 3.16.4. Not only is XO attempting to avoid paying for routine network modifications, but here it attempts to actually force *SBC Illinois* to *pay XO* (in the form of remedy payments) for the work SBC Illinois must perform upon XO's demand. XO's proposal is unreasonable and inappropriate.

Network elements that would require a routine network modification take longer to provision than network elements that do not require a routine network modification. As XO's own proposed contract language shows, routine network modifications may include "rearranging or splicing of cable; adding an equipment case; adding a doubler or repeater; . . . accessing manholes, and deploying bucket trucks to reach aerial cable." XO Section 2.24. Each network modification is potentially different, and it is impossible to predict in advance the provisioning interval that might be required. Such modifications, therefore, should be completed on a project

[4] Citations to a "FCC Rule" refer to the FCC regulations found in Part 51 of the FCC's rules (47 C.F.R. § 51.__).

basis, and not made subject to the standard provisioning intervals that were created to measure the provisioning of network elements that do not require such modifications.

Moreover, SBC Illinois *already has performance measures* that separately measure the performance of the facilities modification process for orders that are worked through that process. These measures, which were developed after lengthy industry discussion, have already been approved by the Commission.[5] XO's attempt to alter SBC Illinois' existing performance measures in this two-party arbitration, and outside the forum already approved by the Commission for addressing such issues (the six-month review collaboratives, which allow parties to consult with the Commission to resolve open issues), is improper and should be rejected.

The FCC expressly stated that "to the extent that certain routine network modifications to existing loop facilities affect loop provisioning intervals, contained in, for example, section 271 performance metrics, we expect that states will address the impact of these modifications as part of their recurring reviews of incumbent LEC performance." *TRO*, ¶ 639. XO's proposal that the Commission address how network modifications should affect loop provisioning intervals *now*, rather than as part of a recurring review of SBC Illinois' performance, is contrary to the FCC's express direction and premature. SBC Illinois will meet all nondiscrimination duties, but there is simply no evidence on which to establish fixed intervals for all types of network modifications, which typically do not involve "standard" work.

Finally, XO's proposal is contrary to this Commission's order in Docket 01-0662 that established a six-month industry collaborative process to deal with issues like this one. There, the Commission approved the current performance measurements and adopted a remedy plan

[5] Order, Docket 01-0662, ¶¶ 3543-45 (May 13, 2003).

that it labeled the "Section 271 Plan."[6] The Section 271 Plan expressly provides the mechanism by which any changes to performance measures or the associated remedies are to be made, *i.e.*, the six-month industry collaborative process. This process is as follows:

> 6.4 Every six months, CLEC may participate with SBC Illinois, other CLECs, and Commission representatives to review the performance measures to determine (a) whether measurements should be added, deleted, or modified; (b) whether the applicable benchmark standards should be modified or replaced by parity standards, or vice versa; and (c) whether to move a classification of a measure, either Tier 1, Tier 2 or both, from Remedied to Diagnostic, or vice versa. Criteria for review of performance measures, other than for possible reclassification, shall be whether there exists an omission or failure to capture intended performance, and whether there is duplication of another measurement. Any changes to existing performance measures and this remedy plan shall be by mutual agreement of the parties and approval of the Commission. Should disputes occur regarding changes, additions and/or deletions to the performance measurements, the dispute shall be referred to the Commission for resolution. The current measurements and benchmarks will be in effect until modified hereunder through this review process or expiration of the interconnection agreement. Order, Docket 01-0662, Appendix A, section 6.4.

Thus, any additions or changes to performance measures, and any changes to the remedy plan, must be made through this industry collaborative process. They cannot be made, as XO suggests, in a two-party arbitration.

ISSUE XO-2: Commingling

The parties have several disagreements regarding the proper contract language to govern "commingling," which is the "connecting, attaching, or otherwise linking of an [UNE] or a combination of [UNEs] to one or more facilities or services that a [CLEC] has obtained at wholesale from an [ILEC]." FCC Rule 5.

[6] Order, Docket 01-0662, ¶ 3508 (May 13, 2003).

First, in Section 3.14.1, XO proposes contract language permitting XO to commingle UNEs with "network elements provided pursuant to Section 271(c)" of the 1996 Act, while SBC Illinois proposes contract language providing to the contrary. SBC Illinois' proposal is required by the *TRO*, while XO's proposal violates the *TRO*. The FCC made crystal clear in the *TRO* that commingling *excludes* network elements provided pursuant to section 271.

In paragraph 584 of the *TRO*, the FCC originally, and erroneously, stated that "we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements unbundled pursuant to section 271 and any services offered for resale pursuant to section 251(c)(4) of the Act." However, the FCC quickly realized its error, and in the *Errata* to the *TRO* it expressly deleted the phrase "any network elements unbundled pursuant to section 271" from paragraph 584.

Moreover, the FCC made clear throughout its discussion of commingling that the "wholesale services" with which UNEs may be commingled are "switched and special access services offered pursuant to tariff," as well as section 251(c)(4) resale services. *Id.* ¶¶ 579, 584. Indeed, the FCC referred to tariffed access services repeatedly throughout its discussion of commingling, but not once to section 271 network elements. *TRO*, ¶¶ 579-84.

Second, XO opposes inclusion of certain restrictions in Section 3.14.1 on its ability to commingle. The restrictions at issue parallel the combining restrictions mandated by the Supreme Court in the *Verizon* case,[7] and XO asserts that the *Verizon* case did not address commingling. But whether the *Verizon* case expressly addressed commingling is irrelevant. The language SBC Illinois seeks to include merely provides the type of sensible limitations that the

[7] *Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2001).

Supreme Court recognized in *Verizon* in the context of an ILEC's obligation to combine UNEs on behalf of a CLEC. Those limitations apply equally to an ILECs obligation to commingle UNEs and wholesale service on behalf of a CLEC (or to perform functions necessary for the CLEC to complete the actual commingling). Just as the Supreme Court in *Verizon* found that an ILEC has no obligation to combine UNEs where doing so would not be technically feasible, would impair "network reliability or security," would impair SBC Illinois' ability to maintain the performance of its network, or would undermine the ability of other CLECs to access UNEs or interconnect with SBC Illinois' network, this Commission should find that such actions need not be undertaken by the ILEC in the commingling context. Such provisions are eminently reasonable on their face and should be adopted. XO has not, and cannot, provide any justification for why it should be able to commingle UNEs even when doing so would threaten the reliability of the network or prevent other CLECs from accessing UNEs.

Third, XO wrongly opposes the use of the bona fide request ("BFR") process for requesting SBC Illinois to perform commingling functions. *See* SBC Ill. Sections 3.14.1.3 and 3.14.1.3.1. SBC Illinois' BFR process is the time-tested, Commission-approved way for SBC Illinois to respond to specialized requests from CLECs. This process has been in place since 1996, and the Commission has upheld that process as reasonable. Nov. 26, 1996 Arbitration Decision, Docket Nos. 96-AB-003/96-AB-004, at 50 (upholding 30-day period for SBC Illinois to respond to a BFR with a preliminary analysis); Dec. 17, 1996 Arbitration Decision, Docket No. 96-AB-006, at 30 (upholding 120-day maximum interval for final response to BFR); Aug. 8, 2001 Arbitration Decision, Docket No. 01-0338 at 23 (finding that BFR process was appropriate); March 21, 2001 Arbitration Decision, Docket No. 00-0769, at 15-16 (same); June

11, 2002 Order, Docket No. 01-0614 at 150 (SBC Illinois' modified BFR process approved to process requests for new combination).

It is impossible for SBC Illinois to anticipate in advance all the commingled arrangements that XO or other CLECs might order. In fact, the arrangements that might be requested by XO is limited only by the imagination of XO personnel. The BFR process, which the Commission has directed the use of in the past, is the appropriate ordering process for such undefined and unidentified arrangements. As commingled arrangements are identified and defined, SBC Illinois will develop processes to eliminate the need for BFRs.

Fourth, XO asserts that SBC Illinois should be required to perform commingling functions free of charge. *See* XO Section 3.14.1.3.2. XO's sole basis for this suggestion is that in discussing commingling the FCC addressed the monthly prices for commingled circuits, rejecting "ratcheting." *See TRO,* ¶ 582.[8] The FCC did not address nonrecurring charges for the work ILECs perform to establish commingling arrangements. But this silence cannot be interpreted as overruling the FCC's pricing rules, or as denying ILECs cost recovery for the work they perform at a CLECs' demand, or as giving CLECs a free ride. The work SBC Illinois performs to provide XO a commingled UNE is part of cost of providing that UNE, and thus SBC Illinois is entitled to recover those costs pursuant to Section 252 of the 1996 Act.

The Commission has consistently adhered to principles of cost-causation that require a user to compensate SBC Illinois for the costs that are incurred to provide the service requested by the user. Most recently, the Commission relied on this bedrock principle to rule that AT&T

[8] "Ratcheting" is "a pricing mechanism that involves billing a single circuit at multiple rates to develop a single, blended rate." *TRO,* ¶ 580 n.1785. It has nothing to do with nonrecurring charges for performing the work necessary to commingle.

must compensate SBC Illinois for the costs it incurs to change its OCN and ACNA records to accommodate changes requested by AT&T. August 26, 2003 Arbitration Decision, Docket No. 03-0326, at 19. The result should be no different here.

ISSUE XO-3: Combinations [omitted]

ISSUE XO-4: Conversions

SBC Illinois' proposed contract language provides that "[u]pon the issuance of the Court's mandate in *USTA II,* and in the absence of lawful and effective FCC rules or orders requiring conversion of wholesale services to lawful UNEs, SBC Illinois is not obligated to [perform conversions]." SBC Ill. Section 3.15.1. XO opposes this and instead proposes language that would simply require SBC Illinois to perform conversions without limitation. *See* XO Section 3.15.2. XO's proposal cannot be adopted, because it is inconsistent with current law.

While the FCC concluded in the *TRO* that ILECs must allow CLECs to "convert wholesale services to UNEs and UNE combinations, so long as the competitive LEC meets the eligibility criteria that may be applicable" (*TRO*, ¶ 586), the D.C. Circuit ruled otherwise in *USTA II*. In response to ILEC objections to the FCC's decision to allow "conversions" of special access to UNEs, the D.C. Circuit held that "the presence of robust competition in a market where CLECs use critical ILEC facilities by purchasing special access . . . precludes a finding that the CLECs are 'impaired' by a lack of access to the element under § 251(c)(3)." 359 F.3d at 593. Thus, for instance, "CLECs hitherto relying on special access might be barred from access to EELs [enhanced extended link] as unbundled elements." *Id.* In other words, the very fact that there exists a wholesale arrangement that might be converted to UNEs demonstrates that the CLEC is not impaired without access to, and thus cannot access, UNEs.

This binding federal law from the D.C. Circuit cannot be ignored. It is well-settled that a federal court reviewing a state commission decision under the 1996 Act, such as the Commission decision that will conclude this arbitration, must "apply all valid, implementing FCC regulations now in effect [at the time of review] . . . to the disputed interconnection agreements," regardless of what regulations were previously in effect. *US West Comms. v. Jennings*, 304 F.3d 950, 958 (9th Cir. 2002). *See also id.* at 956 ("we conclude that we must ensure that the interconnection agreements comply with current FCC regulations, regardless of whether those regulations were in effect when the [state commission] approved the agreements"); *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1130 n.14 (9th Cir. 2003) ("all valid implementing regulations in effect at the time that we review district court and state regulatory commission decisions, including regulations and rules that took effect after the local regulatory commission rendered its decision, are applicable to our review of interconnection agreements"); *Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 388 (7th Cir. 2004) (same). Just like a reviewing court, the Commission must apply the law in effect at the time of its decision – which in this case includes *USTA II*.[9] SBC Illinois' proposed language properly recognizes the effect of *USTA II*. That language provides that SBC Illinois is not required to perform conversions upon the issuance of the mandate in *USTA II*, unless "lawful and effective FCC rules or orders require conversion."

The parties have several other disagreements regarding the contract language that should govern conversions in the case lawful and effective FCC rules or orders require such conversions.

[9] The mandate in *USTA II* was issued on June 16, 2004.

First, in Section 3.15.3, XO proposes that the contract should prohibit SBC Illinois from imposing *any* charges in connection with conversions, while SBC Illinois' language would prohibit the assessment of untariffed termination charges, disconnect fees, reconnect fees, or charges "associated with establishing a service for the first time," but would allow the assessment of "applicable service order charges and record change charges." SBC Illinois' proposed language is consistent with the *TRO*, while XO's is not.

Nothing in the *TRO* gives CLECs a free ride or enables them to avoid paying cost-based charges for the work an ILEC actually performs to process a conversion. In the *TRO*, the FCC prohibited only the assessment of certain "wasteful and unnecessary charges." *TRO*, ¶ 587. For instance, a conversion does not involve "establishing service for the first time" or any physical "reconnect and disconnect" activities, and thus, the FCC concluded, assessing charges for such activities when they are not actually performed would be "wasteful and unnecessary." *Id.* But nowhere did the FCC suggest that CLECs can avoid paying cost-based charges for the actual work ILECs perform to process a conversion – and indeed that would be contrary to the cost-based pricing requirements of the 1996 Act and the FCC's TELRIC rules.

XO's proposal that SBC Illinois be precluded from assessing any "charge for conversions of UNEs or UNE combinations" (XO Section 3.15.3) is also directly contrary to the Commission's Order in SBC Illinois' recently completed TELRIC rate proceeding, Docket 02-0864. In that Order, the Commission approved a "project administration" charge for the recovery of costs associated with the processing of orders for the conversion of special access services to combinations of unbundled loops and unbundled dedicated transport (the most common example of a conversion of a wholesale service to UNEs). Order, Docket No. 02-0864,

at 214-15 (June 9, 2004). The charge is also applicable to the conversion of resale private line circuits to combinations of UNEs. *Id*.

SBC Illinois' proposed language allows it to assess applicable "service order charges and record change charges" (SBC Ill. Section 3.15.3), as it is entitled to do so under the 1996 Act. To order a conversion, a CLEC must place a service order, and SBC Illinois must process that service order – hence the service order charge. Further, as the FCC recognized in the *TRO*, a conversion "is largely a billing function." *TRO*, ¶ 588. A "record change" charge covers SBC Illinois' costs of performing a billing records change. Thus, neither of these costs are "wasteful" or "unnecessary." To the extent that XO is authorized to order special access to UNE conversions, SBC Illinois' proposed contract language would allow it to assess the "project administration" charge for the recovery of the costs incurred in connection with such conversions, as approved by the Commission in Docket No. 02-0864.

XO's proposed Section 3.15.3 is also overbroad to the extent that it would prohibit SBC Illinois from assessing any "termination charges" applicable to the conversion to UNEs of wholesale services, as SBC Illinois' proposed Section 3.15.10 (which XO opposes in its entirety) provides. For example, SBC Illinois' interstate and intrastate special access tariffs contain identical language providing for the application of termination charges to the early termination of multiyear agreements for the purchase of special access tariffs at discounted rates. Such termination charges are applicable to the conversion to UNEs of special access services purchased under the tariffs. *See Globalcom, Inc. v. Illinois Commerce Commission*, 806 N.E.2d 1194, 1205-06 (Ill. App. 2004). The FCC has consistently rejected proposals that LECs be prohibited from assessing early termination charges, such as those provided for by SBC Illinois' tariffs, upon the conversion of special access services to EELs. *See e.g., UNE Remand Order*, ¶

481 n. 985 ("[w]e note, however, that any substitution of unbundled network elements for special access would require the requesting carrier to pay any appropriate termination penalties under volume or term contracts*")*; *Joint Application of Bell South, et al*., 17 F.C.C.R 17595, ¶ 212 (2002) (stating that "early termination penalties" are not an obstacle to a CLEC's "ability to convert special access circuits to EELs" and do not violate FCC rules). In the *TRO*, the FCC reaffirmed these rulings, stating that "we remain unconvinced by the general argument advanced by several commenters that converting a special access circuit to a UNE does not constitute a termination within the meaning of the termination provisions of incumbent LEC tariffs." *TRO*, ¶ 695. The FCC expressly refused to grant CLECs a "fresh look" with respect to the applicability of termination charges to special access to UNE conversions, holding that doing so "would neither be in the public interest nor represent a competitively neutral approach." *Id.* ¶ 696. Thus, the FCC ruled, CLECs must comply with early termination provisions of any fixed term agreements. *Id.* ¶¶ 692-99.

For the same reasons, the Commission should reject XO's proposed Section 3.15.7,[10] which would require SBC Illinois to convert a special access service within 30 days, with no minimum period termination liability, where SBC Illinois denies a request for a UNE (*e.g.*, for a lack of facilities). That proposed language is contrary to the FCC's holdings regarding the applicability of early termination charges, and finds no support in the *TRO*.

Second, the parties disagree regarding the proper conversion ordering processes and timeline (Sections 3.15.4, 3.15.5, and 3.15.6). SBC Illinois proposes that "[w]here processes for the conversion requested . . . are not already in place, SBC Illinois will develop and implement

[10] The parties' joint matrix inadvertently indicated that SBC Illinois proposed the same language for Section 3.15.7 as XO. SBC Illinois does not propose any language for that section, and disagrees with XO's proposed language.

processes" and the parties will "comply with any applicable change management guidelines." SBC Ill. Section 3.15.4. XO, on the other hand, proposes that SBC Illinois be required to process conversion orders manually until it creates an ASR-driven conversion process (Sections 3.15.4 and 3.15.5), and that it process all conversion requests in 15 days (Section 3.15.6). XO's proposal is inappropriate and should be rejected. There is no reason to change existing ordering procedures, and XO should not be allowed to unilaterally dictate the processes that SBC Illinois will develop where existing processes are not already in place. Rather, like other process changes, the development of new processes for conversions and related timelines should be handled through the existing "change management" process.

SBC Illinois' change management process provides detailed timelines and procedures for developing and implementing OSS changes, like ordering process changes, and provides for substantial CLEC input. It also permits the industry to prioritize projects so that SBC Illinois can work on the projects that are most useful to CLECs first. The process was developed after many months of negotiations with CLECs throughout SBC's service territory, and has been approved by numerous state commissions, *including this Commission in the 271 proceeding*. *See* Order on Investigation, Docket No. 01-0662, at 252 (May 13, 2003). SBC Illinois' change management process was also expressly approved by the FCC. *Illinois 271 Order*, ¶¶ 134-40. There is no reason to depart from that process here.

Third, XO objects to SBC Illinois' proposed Sections 3.15.9 and 3.15.10, but has not articulated any specific objection to those sections. Section 3.15.9 simply provides that to order a conversion the "CLEC must follow the guidelines and ordering requirements" that are in place for the particular "service sought to be converted." This provision cannot reasonably be objected to, and should be adopted. Requiring parties to follow defined ordering processes will minimize

disputes and maximize the timely and efficient processing of orders. SBC Illinois' proposed Section 3.15.10 provides that the conversion terms of the agreement do not "provide[] CLEC with an opportunity to supresede or dissolve existing contractual arrangements, or otherwise affect SBC Illinois' ability to enforce any tariff, contractual, or other provision(s), including those providing for early termination or similar charges." This language is directly supported by the *TRO*, which states: "We decline to require incumbent LECs [to] provide requesting carriers an opportunity to supresede or dissolve existing contractual arrangements through a conversion request." *TRO*, ¶ 587. For instance, if a CLEC "enters into a long-term contract to receive discounted special access services," the CLEC "cannot dissolve the long-term contract based on a future decision to convert the relevant circuits to UNE combinations." *Id.* Similarly, as discussed above, the FCC ruled that CLECs must comply with early termination provisions of any fixed term agreements. *Id.* ¶ 587.

Fourth, XO also objects to the provisions proposed by SBC Illinois in Sections 3.15.2 and 3.15.8 designed to ensure compliance with any eligibility criteria. XO's objection is without merit. In the *TRO* the FCC unequivocally stated that to convert services "the competitive LEC [must] meet[] the eligibility criteria that may be applicable." *TRO*, ¶ 586. "To the extent a competitive LEC fails to meet the eligibility criteria for serving a particular customer, the serving incumbent LEC may convert the UNE or UNE combination to the equivalent wholesale service in accordance with the procedures established between the parties." *Id.*

SBC Illinois' proposed language directly implements these requirements: Section 3.15.2 says that XO must satisfy any applicable eligibility criteria before SBC Illinois is obligated to perform a conversion; and Section 3.15.8 says that "[t]o the extent CLEC fails to meet (including

ceases to meet) the eligibility criteria" for conversions, SBC Illinois "may convert" the UNEs "to the equivalent wholesale service, or group of wholesale services, upon written notice to CLEC."

While XO asserts that this language gives "SBC too much unilateral power," XO fails to propose any competing language to implement the requirements of paragraph 586. But those requirements clearly must be reflected in the parties' contract, because without the enforcement mechanism contemplated by paragraph 586, the eligibility criteria will have no teeth. Moreover, SBC Illinois' proposed language does not give "SBC too much unilateral power." If a CLEC believes that SBC Illinois has inappropriately invoked its right to convert UNEs to wholesale arrangements where eligibility requirements are not met, it can always invoke the dispute resolution provisions of the parties' contract.

ISSUE XO-5: Qualifying Service

In the *TRO*, the FCC concluded that "in order to gain access to UNEs, carriers must provide qualifying services using the UNE to which they seek access. By 'qualifying,' we mean those telecommunications services offered by requesting carriers in competition with those telecommunications services that have been traditionally the exclusive or primary domain of incumbent LECs." *TRO*, ¶ 135. Thus, for instance, a CLEC cannot use a UNE solely to provide long distance service.

While the D.C. Circuit took issue with aspects of the particular reasoning used by the FCC as the basis for its distinction between qualifying and non-qualifying services (*see USTA II*, 359 F.3d at 592), the D.C. Circuit did not disagree with the premise of that distinction: that CLECs should not be able to access UNEs if they are not using the UNEs to provide the services with respect to which the FCC found impairment. *See id.* at 592 ("the prevention of 'gaming' by CLECs seeking to offer services for which they are not impaired" is a "legitimate . . . goal[]").

Indeed, the D.C. Circuit noted that the 1996 Act allows the FCC to engage in a service-by-service analysis of impairment, and thus, for instance, the FCC could determine that CLECs cannot use UNEs to provide only long distance services because CLECs are not "impaired with respect to the provision of long distance services." *Id.* As explained below, SBC Illinois' language appropriately implements the qualifying and non-qualifying service distinction, while XO's language does not.

First, in Section 1.2, SBC Illinois proposes, and XO opposes, language providing that a carrier cannot access UNEs unless it is a "telecommunications carrier" providing "telecommunications services," as those terms are defined by the 1996 Act. This language is drawn directly from section 251(d)(2) of the Act, which requires unbundled access only where the lack of access would "impair the ability of the *telecommunications carrier* seeking access to provide the *services* it seeks to offer." 47 U.S.C. § 251(d)(2) (emphases added). The FCC interpreted the reference to "services" in this section to refer to "telecommunications services," and the D.C. Circuit agreed with that interpretation. *USTA II*, 359 F.3d at 591. XO's proposal to omit this language from Section 1.2 is contrary to the Act, and must be rejected.

With respect to Section 1.2, the parties also dispute whether the CLEC should be required only to "offer" a qualifying service (XO's proposal), or whether it must actually "provid[e] at least one Qualifying Service on a Common Carrier basis" (SBC Illinois' proposal). SBC Illinois' language should be adopted. XO should not be able to purchase UNEs solely to provide, *e.g.*, long distance service, and avoid a qualifying service restriction by "offering" (but not actually providing) a qualifying service like local phone service. Indeed, the FCC held that "carriers must *provide* qualifying services using the UNE to which they seek access." *TRO*, ¶ 135 (emphasis added).

XO should also be required to provide the qualifying service on a common carrier basis, as SBC Illinois proposes (Sections 1.2, 2.22.2), and XO opposes. *See id.* n.448 ("There services must be offered on a common carrier basis"); *id.* ¶ 150 ("to obtain access to a UNE, a requesting carrier must use the UNE to provide at least some services on a common, rather than private, carriage basis"). The FCC concluded that such a requirement serves the public policy goals of the 1996 Act because "[i]n exchange for obtaining UNEs, a requesting carrier must not only provide services that compete head-to-head against the incumbent LEC, but must do so on a basis that ensures that the benefits of competition accrue to the general public." *Id.* ¶ 151. The Commission should reach the same conclusion here. XO should not be allowed to access UNEs to provide only non-local services, or to "offer" local service only to select individuals rather than to many potential customers through a generally available offering.

XO also opposes any contract language that would require a CLEC to certify its compliance with qualifying service restrictions (SBC Ill. Section 1.2.3) and requiring the CLEC to continuously comply with the qualifying service restrictions (SBC Ill. Section 1.2.4). But such restrictions would be near-meaningless if there were no way to enforce them, and SBC Illinois' proposed language is a commercially reasonable method to enforce those restrictions. Contrary to XO's suggestion, SBC Illinois' language would not "make it difficult for a carrier to use UNEs for non-qualifying services even if the conditions required by the FCC were met." Under SBC Illinois' proposed language, a CLEC is *not* required to prove any compliance with the restrictions in order to use UNEs. Rather, the "CLEC continuously represents and warrants that it satisfies the Qualifying Service(s) conditions." SBC Ill. Section 1.2.3. It is only upon *request* by SBC Illinois that a CLEC would have to provide "written certification" of its compliance. *Id.*

Moreover, SBC Illinois' proposed Sections 1.2.4 and 1.2.4.1 merely specify that not only must XO comply with the qualifying service restrictions, but if it does not comply, SBC Illinois may discontinue providing the relevant UNEs upon 90 days notice. Section 1.2.4.1 also states that SBC Illinois does not waive its right to enforce the restrictions in the future if at any time it fails to take action to enforce those restrictions. XO has not articulated any objection to these provisions, which constitute a commercially reasonable method to implement the qualifying service restrictions.

Finally, XO states that it does not "agree" with SBC Illinois' definition of "local" in SBC Illinois' proposed Sections 2.22.1 and 2.22.3, and asserts that that definition "is not included in the TRO." XO's assertion is irrelevant. Many of the terms used by the FCC in its orders are not expressly defined, but that does not mean those terms should go undefined. To the contrary, to "translate [the FCC's] rules into the commercial environment, and to resolve dispute over any new agreement language arising from differing interpretations of our rules" (*TRO*, ¶ 700) it is often appropriate to expressly define a term to provide certainty as to the meaning of a contract provision, and to reduce the potential for future disputes.

While XO may not "agree" with SBC Illinois' definition, XO has not proposed any competing language or offered any explanation of its disagreement. SBC Illinois' proposed definition of "local" is in accord with the ordinary meaning of the term: "within the SBC Illinois designated local calling area in which the requested UNE is provided." SBC Ill. Section 2.22.1. Moreover, this definition is appropriate to guide the application of the qualifying service test. A qualifying service is one that is in "direct competition" with a core ILEC service. *TRO*, ¶ 139. To make any such "direct competition" comparison, the analysis should be limited to the particular local calling area in which the UNE is located.

ISSUE XO-6: What eligibility and certification requirements should apply for access to high-capacity EELs pursuant to FCC rules?

In the *TRO*, the FCC established "eligibility criteria" that a competitive LEC must meet in order to obtain a high-capacity EEL [a UNE combination of a high-capacity loop and dedicated transport] on an unbundled basis. *TRO*, ¶ 577. The EEL eligibility criteria are designed to ensure that requesting carrier use EELs only if they are providing significant amounts of local usage service to their retail customers. *Id.* ¶¶ 590-91. The criteria, which are set forth in FCC Rule 318, require that a CLEC requesting an EEL: (1) be authorized by the state commission to provide local voice service; (2) actually provide local voice service to a retail customer over every circuit (as evidenced by assigning a local number to each DS1 or DS1-equivalent, and by providing 911/E911 capability for every circuit); and (3) satisfy certain "architectural safeguards," including collocation, interconnection, and termination at a local switch capable of providing local voice traffic. *Id*. ¶¶ 601-10. The FCC also adopted "certification and auditing" requirements to ensure that CLECs purchasing EELs satisfy the eligibility criteria.

While the D.C. Circuit upheld the FCC's EEL eligibility criteria, it vacated the FCC rules requiring unbundled access to dedicated transport and high-capacity loops. ILECs are required to provide UNE combinations only of those elements that are lawfully UNEs under section 251. The FCC's combinations rule expressly requires ILECs to combine only those things that are "unbundled network elements." FCC Rule 315(c). The FCC also ruled that ILECs are *not* required "to combine network elements that no longer are required to be unbundled under section 251." *TRO*, n. 1990. Thus, while SBC Illinois is not currently required by any FCC rule to provide access to EELs on an unbundled basis, to the extent the Commission deems it proper

to include the FCC's EEL eligibility criteria in the parties' agreement, then SBC Illinois' eligibility criteria language should be adopted,[11] and XO's proposed language rejected.

First, the parties disagree regarding the proper definition of an EEL in Section 2.13. The FCC defined EELs "as UNE combinations consisting of unbundled loops and unbundled transport." *TRO*, ¶ 575. *See also* FCC Rule 5 ("An enhanced extended link or EEL consists of a combination of an unbundled loop and unbundled dedicated transport, together with any facilities, equipment, or functions necessary to combine those network elements."). This is how SBC Illinois proposes to define EELs in the parties' contract (subject, of course, to the qualification that it is required to provide combinations only to the extent the component elements are lawfully UNEs). XO, on the other hand, proposes to define EELs to include an "entrance facility" as one of the "network elements" that may comprise an EEL. That is unlawful.

Entrance facilities are not part of an unbundled loop or unbundled transport, and are not UNEs at all. The *TRO* redefined unbundled transport to *exclude* "transmission facilities connecting incumbent LEC networks to competitive LEC networks." *Id.* ¶ 365. Thus, the *TRO* "eliminates 'entrance facilities' as UNEs." *TRO*, n.1116. The FCC left no room for discussion: "We find that no requesting carrier shall have access to unbundled inter-network transmission

[11] As noted above, there are currently no FCC rules requiring ILECs to unbundle high-capacity loops or dedicated transport (and thus EELs), because the D.C. Circuit vacated those rules. The "UNE declassification" language proposed by SBC Illinois is designed to accommodate that fact by restricting SBC Illinois' unbundling obligations to those network elements that the FCC says must be unbundled in valid, effective rules. The parties negotiated before the D.C. Circuit's mandate issued, and SBC Illinois proposed contract language which SBC Illinois now regards as outdated and superfluous (*i.e.*, certain language addressing high-capacity loops, dedicated transport, and mass market switching), and SBC Illinois is willing to delete that language from its contract proposal. There is no need to do so, however, as long as SBC Illinois' proposed language regarding its obligation to provide access only to those specific elements that the FCC has found in valid and lawful rules must be unbundled is adopted (*see* Issues SBC-1 and SBC-2). If SBC Illinois' proposed "UNE declassification" language is not adopted, however, then SBC Illinois is unwilling to agree to language providing access to high-capacity loops, dedicated transport, or EELs, and would withdraw that language.

facilities under section 251(c)(3)." *Id.* ¶ 368. XO's proposed definition is thus unlawful, and must be rejected.[12]

The other dispute with respect to Section 2.13 is SBC Illinois' proposed language stating that an EEL must terminate in a collocation arrangement. The *TRO* (¶ 604) clearly establishes such a requirement, and SBC Illinois language properly reflects that requirement.

Second, the parties propose different certification mechanisms (Sections 3.14.3.2 and 3.14.3.3). XO essentially proposes no mechanism at all, but would instead allow itself to certify "through a reasonably compliant method of its choosing" – perhaps on the back of a cocktail napkin. SBC Illinois' language, on the other hand, requires XO to use the standard certification form provided by SBC Illinois. While this issue may appear to be minor, the Commission should keep in mind that XO is not the only CLEC that might purchase EELs. Requiring every CLEC to use a standard certification form supplied by SBC Illinois will increase efficiency and lower the costs of processing such forms. On the other hand, allowing every CLEC to choose its own certification method would only result in inefficiency and increase transaction costs.

Third, XO opposes the SBC Illinois language that would require XO to maintain documentation, including "call detail records, Local Telephone Number assignment documentation, and switch assignment documentation," to "support its eligibility certifications." SBC Ill. Section 3.14.3.6.2. But in the *TRO* the FCC explicitly stated that it "expect[s] that requesting carriers will maintain the appropriate documentation to support their certifications." *TRO*, ¶ 629. SBC Illinois' language merely translates this requirement into the commercial

[12] XO also proposes language in Section 3.14.3.2 that would allow an EEL to be composed of "section 271 network elements." That proposal is flatly contrary to federal law and must be rejected, as explained below in the discussion of Issue SBC-1.

environment, by providing more certainty regarding the type of "supporting evidence" and "documentation that carriers should keep," and thus reducing the potential for disputes in the future. *Id.* It is commercially reasonable to specify what records should be retained (as SBC Illinois proposes), rather than leave it open for future disputes (as XO proposes).

Fourth, XO proposes that even if an *independent* auditor mutually agreed upon by *both* parties concludes that XO does not satisfy the EEL eligibility requirement, XO should continue to have unbundled access to the EEL until "the Audit is confirmed by the State Commission or FCC." XO Section 3.14.3.2. That not only undermines the entire point of having an independent auditor, but is contrary to the *TRO*. The FCC stated that "[t]o the extent the independent auditor's report concludes that the competitive LEC failed to comply with the service eligibility criteria, that carrier must true-up any difference in payments, convert all noncompliant circuits to the appropriate service, and make the correct payments on a going-forward basis." *TRO*, ¶ 627. The FCC did not say that the CLEC could delay compliance with the law for some additional, indefinite period (possibly as long as a year), until a further level of review is complete. That is not to say that, if a party disagrees with the auditor's report, it cannot seek further review. But, pursuant to the *TRO*, an auditor's finding of noncompliance must be given effect.

Finally, XO takes issue (without explanation) to several miscellaneous provisions in SBC Illinois' proposed contract language. For instance, SBC Illinois proposes in several contract sections to clarify that several of the eligibility criteria apply to "each circuit to be provided to each end-user customer," rather than simply to "each customer." This proposal merely provides clarity and reduces the potential for confusion and future disputes, because the naked term

"customer" can be ambiguous (*e.g.*, it can refer either to XO, the wholesale customer, or to XO's retail end-user customers).

SBC Illinois also proposes that the contract expressly state that the certification requirements apply to DS3 circuits. SBC Ill. Sections 3.14.3.3, 3.14.3.3.2. The FCC's EEL eligibility criteria apply to all "high-capacity EELs," including those at the "DS3" capacity. *TRO*, ¶ 591. XO's objection is thus without basis. Moreover, in its Section 3.14.3.3.2, XO opposes inclusion of the phrase indicated in bold: "Each DS1-equivalent circuit on a DS3 EEL must have its own local number assignment, *** * * such that each DS3 must have at least 28 local numbers assigned to it**." But that language is taken almost verbatim from the *TRO*: "each DS1-equivalent circuit of a DS3 EEL must have its own local number assignment, **so that each DS3 must have at least 28 local voice numbers assigned to it**." *TRO*, ¶ 602 (emphasis added). And that *identical* phrase appears in the FCC's *actual rule*. FCC Rule 318(b)(2)(ii) ("so that each DS3 must have at least 28 local voice numbers assigned to it").

SBC Illinois also proposes that in its certification the CLEC confirm that it "has received state certification to provide local voice service in the area being served or, in the absence of a state certification requirement, has complied with the registration, tariffing, filing fee, or other regulatory requirements applicable to the provision of local voice service in that area." SBC Ill. Section 3.14.3.3. Again, XO's objection is unfathomable. The FCC ruled that "authorization to provide voice service" is "[t]he first prong" of its eligibility criteria. *TRO*, ¶ 601. More significantly, SBC Illinois' proposed contract language again is identical, *word-for-word*, to the FCC's *actual rule*. FCC Rule 318(b)(1).

SBC Illinois also proposes that each circuit have an assigned local number and 911/E911 capability "prior to the provision of service over that circuit." SBC Ill. Sections 3.14.3.3.3.

Again, this language is taken directly from the FCC's rules, which require that these requirements be satisfied for "each circuit . . . prior to the provision of service over that circuit." FCC Rule 318(b)(2)(i) and (iii). Moreover, in SBC Illinois' proposed Sections 3.14.3.4 and 3.14.3.5, to which XO also objects, SBC Illinois merely repeats this requirement, and provides that for *new* EELs the CLEC must (i) certify that it will not provision service until a local number is assigned and 911/E911 capability has been implemented, and (ii) show that it has satisfied these requirements within 30 days of the time the EEL is provisioned. Again, this language is directly supported by the *TRO*. The FCC held that a CLEC "may satisfy the numbering and 911/E911 criteria to initiate the ordering process for a new EEL circuit by certifying that it will not begin to provide service until a local number is assigned and 911 or E911 capability is provided." *TRO*, ¶ 602. Further, the FCC held, "a requesting carrier must assign the number and implement 911/E911 capability within 30 days after the provisioning of the circuit." *Id.* n.1840.

XO also opposes contract language proposed by SBC Illinois in Sections 3.14.3.3.4.1 and 3.14.3.3.4.2 providing that each circuit must terminate in a collocation arrangement "established pursuant to Section 251(c)(6) of the Act and [that] is located at SBC Illinois' premises within the same LATA as the end user customer's premises, when SBC Illinois is not the collocator," or "is located at a third party's premises within the same LATA as the end user customer's premises, when SBC Illinois is the collocator." Again, this proposed contract language directly implements the *TRO*'s requirements. The FCC held that "termination of a circuit *into a section 251(c)(6) collocations arrangement in an incumbent LEC central office*" is required, except where "reverse collocation" (where the ILEC collocates at a third party's premises) occurs.

TRO, ¶ 604 (emphasis added). Moreover, the FCC held, "the collocation arrangement must be within the same LATA as the customer premises." *Id.*

Similarly, XO opposes contract language specifying that each circuit must be served by an interconnection trunk "located in the same LATA as the end user customer premises served by the [EEL]" (SBC Ill. Section 3.14.3.3.5), even though the FCC expressly held that "each EEL circuit must be served by an interconnection trunk in the same LATA as the customer premises served by the EEL." *TRO*, ¶ 607. XO has not, and cannot, articulate any reasonable objection to including this language – which mirrors an express requirement of the *TRO* – in the parties' contract.

Nor can XO articulate any reasonable objection to SBC Illinois' proposed Section 3.14.4, which specifies that the failure of SBC Illinois to enforce the eligibility criteria does not constitute a waiver of SBC Illinois' rights to enforce those criteria. If XO gets away with non-compliance for some period of time, that does not mean it should be able to get away with non-compliance for all time.

ISSUE XO-7: Audits

The *TRO* provides ILECs with certain "right[s] to audit compliance with the qualifying service eligibility criteria." *TRO*, ¶ 626. XO proposes contract language that would substantially deprive SBC Illinois of its auditing rights.

For instance, XO proposes that an audit notice must include "the particular circuits involved and the specific service eligibility criteria with which SBC Illinois asserts noncompliance," and proposes that the audit (and any resulting remedies) be limited to the specific eligibility criteria with respect to which SBC Illinois asserted noncompliance. XO Sections 3.14.3.8.1, .2, .5, .6, and .7. But the *TRO* contains no such limitations. An ILEC's audit

right is not limited to circumstances where the ILEC can make specific allegations of noncompliance, as XO proposes. To the contrary, the FCC held that "incumbent LECs may obtain and pay for an independent auditor to audit, on an annual basis, compliance with the qualifying service eligibility criteria." *TRO*, ¶ 626. The FCC said nothing about limiting this right to instances where the ILEC is able to make specific allegations of noncompliance.

And that would make no sense. CLECs, not ILECs, possess much of the data necessary to determine whether the CLEC is in compliance with the eligibility criteria. That is precisely why the FCC created the audit right – so that the ILEC could have an independent third party review the data to which the ILEC does not have access to determine compliance. *See id.* (audits are appropriate to satisfy "the incumbent LECs' need for usage information").

Moreover, the FCC concluded that this right to an "annual audit . . . strikes the appropriate balance between the incumbent LECs' need for usage information and risk of illegitimate audits that impose costs on qualifying carriers." *Id.* To "eliminate the potential for abusive or unfounded audits," the FCC imposed a "reimbursement requirement," requiring the ILEC to reimburse the CLEC for its costs if the auditor concludes the CLEC "complied in all material respects with the eligibility criteria." *Id.* ¶ 628. In short, while the FCC could have limited audit rights to cases where an ILEC "asserts noncompliance," as XO proposes, it did not. Instead, it created three different safeguards: (1) an ILEC may invoke an audit only once per year, (2) the ILEC must pay the auditor, and (3) the ILEC must reimburse the CLEC for its expenses if the auditor concludes the CLEC complied with the eligibility criteria.

In short, the auditing right created by the *TRO* is not restricted to cases where the ILEC "asserts noncompliance" with the eligibility criteria with respect to particular circuits, as XO proposes, and thus XO's proposed language must be rejected. Rather, it is a broad, discretionary

right that applies whether or not the ILEC has suspicion or cause to suspect or assert noncompliance.[13] Without an audit, as noted above, an ILEC may be denied access to the data and information necessary to form a good faith belief regarding compliance or non-compliance, because only the CLEC possesses much of that data and information. Thus, restricting the audit as XO proposes simply makes no sense. Moreover, the FCC's restriction of a general audit to a once-per-year event (*TRO*, ¶ 626) would make no sense under XO's proposal. In cases where an ILEC has cause to believe and affirmatively asserts non-compliance with the eligibility criteria, the ILEC should not be forced to wait up to 12 months to begin a formal investigation (*i.e.*, an audit) of its complaint. Rather, the 12-month restriction makes sense only if viewed as a restriction on an ordinary, once-yearly review that an ILEC may invoke whether or not it has cause to assert noncompliance.[14]

XO also opposes some of SBC Illinois' proposed language in Section 3.14.3.8.3, which XO alleges "would specifically list auditing standards." The language to which XO objects, however, is taken *verbatim* from the *TRO*. In paragraph 626, the FCC held that the relevant auditing standards "will require the auditor to perform an 'examination engagement' and issue an opinion regarding the requesting carrier's compliance with the qualifying service eligibility criteria," and "[c]onsistent with standard auditing practices, such audits require compliance testing designed by the independent auditor, which typically include an examination of a sample

[13] In footnote 1900 of the *TRO*, the FCC noted that "an incumbent LEC that questions the competitor's certification [of compliance with the EEL eligibility criteria] may do so by initiating the audit procedures set forth below." The FCC did *not*, however, state that an ILEC can *only* initiate the audit procedures if its questions the competitor's certification.

[14] Where a routine audit does result in a finding that a CLEC is not in compliance with the eligibility requirements, however, the ILEC also should not have to wait another year to begin another audit to ensure the CLEC has begun complying with the restrictions. Rather, the clock should be immediately re-set, as SBC Illinois' proposed Section 3.14.3.8.5 provides.

selected in accordance with the independent auditor's judgment." *TRO*, ¶ 626. This language, which is important in order to, among other things, ensure that the CLEC allows the auditor to conduct "compliance testing," should be included in the parties' contract. XO's suggestion that incorporating the FCC's specific requirements in the parties' agreement "would burden the agreement with unnecessary detail" is without merit, and should be rejected.

The parties also disagree regarding what should occur in the event the auditor concludes that XO is in non-compliance. The FCC requires that, in such an event, the CLEC "must true-up any difference in payments, convert all noncompliant circuits to the appropriate service, and make the correct payments on a going-forward basis." *TRO*, ¶ 627. While both parties propose to include this language in their agreement (Section 3.14.3.8.5), SBC Illinois proposes some additional language to clarify (1) when the true up payments begin, and (2) how the conversion of noncompliant circuits is to be accomplished.

With respect to the former, SBC Illinois' proposed language provides that the true up payments begin "from the date that the non-compliant circuit was established." SBC Ill. Section 3.14.3.8.5. XO has not articulated any objection to this language, but apparently would prefer to leave the language vague. That is inappropriate and unreasonable, because it may lead to disputes in the future. SBC Illinois also proposes that "[i]n no event shall rates set under Section 252(d)(1) of the Act apply for the use any Lawful UNE for any period in which CLEC does not meet the conditions set forth" in the eligibility criteria section of the parties' contract. Again, this language is necessary to make clear that, for any periods when XO was not in compliance with the eligibility criteria, and thus was not lawfully entitled to an EEL, it also is not entitled to the TELRIC-based prices that apply to EELs, as opposed to, *e.g.*, the applicable special access charges.

With respect to the latter, SBC Illinois' proposed language provides that, if the auditor concludes that XO has failed to comply with the eligibility criteria, SBC Illinois may "initiate and affect such a conversion on its own." SBC Ill. Section 3.14.3.8.5. XO's objection to this language is without merit. If XO has failed to comply with the eligibility criteria, it should not be allowed to continue to purchase the EEL, and delay its compliance with the law, until it gets around to submitting a conversion request.

Finally, XO objects to SBC Illinois' attempt to establish parity of treatment between the assessment of costs where an auditor does and does not find compliance with the eligibility criteria. *See* SBC Ill. Section 3.14.3.8.6. The FCC held that "to the extent the independent auditor's report concludes that the competitive LEC failed to comply in all material respects with the service eligibility criteria, the competitive LEC must reimburse the incumbent LEC for the cost of the independent auditor. . . . Similarly, to the extent the independent auditor's report concludes that the requesting carrier complied in all material respect with the eligibility criteria, the incumbent LEC must reimburse the audited carrier for its costs associated with the audit." *TRO*, ¶¶ 627-28. The FCC thus mandated parity of treatment: if the auditor concludes that the CLEC complied in all material respect, the ILEC pays the CLEC's costs; and if the auditor concludes that the CLEC did not comply in all material respects, the CLEC pays the ILEC's costs. This is precisely what SBC Illinois' proposed language provides. SBC Ill. Section 3.14.3.8.6.

XO's attempt to create some kind of "pro-rata cost" apportionment is unsupported by the *TRO*. *See* XO Section 3.14.3.8.6. Either the CLEC complied in all material respects, or it did not. And, pursuant to the *TRO*, that is the issue upon which cost apportionment turns.

ISSUE SBC-1:

(a) Under what circumstances may SBC Illinois discontinue offering a network element that no longer is required to be unbundled?

(b) Under the TRO, may either party change the change of law language?

Issue SBC-1 concerns several different contract provisions, but present one overriding issue: whether the interconnection agreement should obligate SBC Illinois to continue to provide network elements that are no longer required to be unbundled (*i.e.*, that have been "declassified") at the same rates, terms, and conditions that would apply if the network elements were required to be unbundled. SBC Illinois' proposed contract language answers this question in the negative, stating that SBC Illinois is required to provide as UNEs only those network elements that are actually, and lawfully, UNEs (*i.e.*, that have lawfully been found to be required to be provided as UNEs pursuant to section 251 of the 1996 Act). XO's proposed contract language, on the other hand, unlawfully erases the line between those things that are UNEs and those things that are not, requiring SBC Illinois to provide both at the same rates, terms, and conditions. XO's proposed language should be rejected, in favor of SBC Illinois' proposed contract language.

The contract language SBC Illinois proposes provides that SBC Illinois is required to provide only "Lawful UNEs," defined as "UNEs that SBC Illinois is required to provide pursuant to Section 251(c)(3) of the Act, as determined by lawful and effective FCC rules and associated lawful and effective FCC and judicial orders or lawful and effective orders and rules of the [ICC] that are necessary to further competition in the provision of telephone exchange service or exchange access and that are not inconsistent with the [1996 Act] or the FCC's regulations to implement the [1996 Act]." SBC Ill. Section 1.1. Network elements that do not

satisfy this standard, but were previously provided as UNEs, are considered "declassified." This language appropriately reflects SBC Illinois' obligations to provide UNEs under the *TRO* and the 1996 Act.

While section 251(c)(3) of the Act requires ILECs to "unbundle" certain network elements, Congress did not specify the particular network elements that must be unbundled. Rather, it directed the FCC to determine which network elements must be unbundled by applying the "impairment" test of section 251(d)(2). As the Supreme Court held in *Iowa Utilities Board*, "[s]ection 251(d)(2) does not authorize the [FCC] to create isolated exemptions from some underlying duty to make all network elements available." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 391 (1999). Rather, Congress required the FCC to "determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements." *Id.* at 391-92. In other words, as the FCC has held, "section 251(c)(3) does not itself create 'some underlying duty' to 'provide all network elements for which it is technically feasible to provide access.' Instead, it is section 251(d)(2) that directs the [FCC] to issue legislative rules imposing unbundling obligations on incumbent LECs." *Supplemental Order Clarification*, ¶ 15 n.50.

Moreover, as the D.C. Circuit made clear in *USTA II*, it is the *FCC* that must determine which network elements satisfy the "impairment" requirement of section 251(d)(2), and thus must be offered as UNEs pursuant to section 2512(c)(3). The FCC cannot delegate this authority to state commissions, because "Congress left to *the Commission [the FCC]* the choice of elements to be 'unbundled.'" *USTA II*, 359 F.3d at 561. In short, "the UNEs that SBC Illinois is required to provide pursuant to Section 251(c)(3) of the Act" are limited to those "determined by

lawful and effective FCC rules and associated lawful and effective FCC . . . orders," precisely as SBC Illinois' proposed contract language provides.[15] SBC Ill. Section 1.1.

SBC Illinois' proposed contract language also provides that "lawful UNEs" include those network elements that SBC Illinois is required to unbundle pursuant to "lawful and effective orders and rules of the [ICC] that are necessary to further competition in the provision of telephone exchange service or exchange access and that are not inconsistent with the [1996 Act] or the FCC's regulations to implement the [1996 Act]." SBC Ill. Section 1.1. Again, such language is required by the *TRO* and the 1996 Act. In the *TRO*, the FCC held that "states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations." *TRO*, ¶ 187. Rather, the FCC held, such actions must be "consistent with the Act" and with "the [FCC's] section 251 implementing regulations" (*TRO*, ¶ 193 & n.614), which is precisely what SBC Illinois' proposed language provides. This language is also directly supported by section 261(c) of the Act ("additional state requirements"), which states: "Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are *necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with* [sections 251-261 of the Act] *or the [FCC's] regulations to implement* [those sections]." 47 U.S.C. § 261(c) (emphasis added).

In sum, SBC Illinois' proposed "lawful UNE" language appropriately identifies the scope of SBC Illinois' obligation under the 1996 Act to provide UNEs. XO's proposed language, on the other hand, does not. In particular, XO attempts to add section 271 checklist items as UNEs

[15] SBC Illinois' proposed language also provides that "lawful UNEs" include those UNEs required by lawful and effective "judicial orders." SBC Ill. Section 1.1. Surely such language is not controversial.

that SBC Illinois must provide under this section 251 interconnection agreement on the same rates, terms, and conditions that apply to section 251 UNEs. *See, e.g.*, XO Section 1.1. That proposal is unlawful both because (1) the FCC held in the *TRO* that section 251 UNE rates, terms, and conditions do *not* apply to section 271 checklist items, and (2) the Commission lacks jurisdiction to determine the appropriate rates, terms, and conditions for section 271 checklist items.

In the *TRO*, the FCC held that "section 251 and 271 . . . operat[e] independently." *TRO*, ¶ 655. Thus, "[w]here there is no impairment under section 251 and a network element is no longer subject to unbundling, we look to section 271 and elsewhere in the Act to determine the proper standard for evaluating the terms, conditions, and pricing under which a BOC must provide the checklist network elements," because section 251 no longer governs those rates, terms, and conditions. *Id.* ¶ 656. And in particular, "section 271 . . . does not require TELRIC pricing." *Id.* ¶ 659.

Moreover, in *USTA II* the D.C. Circuit expressly upheld the FCC's determination that the TELRIC prices that apply to section 251 UNEs do *not* apply to section 271 checklist items. The Court upheld the FCC's "decision to confine TELRIC pricing to instances where it has found impairment" under section 251 and its determination "that TELRIC pricing was not appropriate in the absence of impairment." 359 F.3d at 589. In sum, XO's proposal to treat section 271 checklist items as section 251 UNEs is contrary to law.

Further, as noted above, the Commission does not have jurisdiction to address the rates, terms, and conditions for section 271 checklist items, and thus must reject XO's proposed contract language. The FCC held that section 271 checklist items are not governed by section 251 of the 1996 Act, but instead are governed by "the standards set forth in sections 201

and 202" of the 1934 Communications Act. *TRO*, ¶ 656. *See also id.*, ¶ 662 ("'If a checklist network element does not satisfy the unbundling standards in section 251(d)(2), the applicable prices, terms and conditions for that element are determined in accordance with sections 201(b) and 202(a).'"). Those sections do not provide jurisdiction to state commissions, but instead grant the *FCC* certain powers and jurisdiction. Thus, the FCC held, "[w]hether a particular checklist element's rate satisfies the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry that *the Commission [i.e., the FCC] will undertake* in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6)." *Id.*, ¶ 664.

Section 252 also makes clear that section 271 network element issues are not within the jurisdiction of state commissions. An ILEC can be compelled under the 1996 Act to negotiate, and arbitrate if necessary, an interconnection agreement only to provide "interconnection, services or network elements pursuant to section 251," not section 271. 47 U.S.C. § 252(a)(1), (b)(1). And section 252(c) provides that the state commission's role in an arbitration is to ensure that the resulting interconnection agreement "meets the requirements of section 251" – not section 271. 47 U.S.C. § 252(c)(1).

In sum, XO's proposal that the Commission require SBC Illinois to provide section 271 checklist items at the same rates, terms, and conditions as section 251 UNEs is both unlawful and beyond this Commission's jurisdiction.

XO also asserts that SBC Illinois' proposed contract language constitutes an impermissible change to the existing "change of law" provisions of the parties' contract. XO suggests that any time a network element is added to or subtracted from the list of network elements that are UNEs, the parties must negotiate anew to incorporate that change into the

existing contract; any other result, XO contends, would constitute an impermissible modification of the parties' existing change of law process. But if that is true, then the Commission must reject XO's proposed contract language.

For instance, in Section 1.1, XO proposes that SBC Illinois be obligated, "[n]otwithstanding any other provision of the Agreement," to provide access to UNEs "to the extent required by (a) 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51, (b) 47 U.S.C. § 271(c) and 47 C.F.R. Part 51, and/or (c) other Applicable Law (including, but not limited to, orders and rules of the [ICC])." This language suggests that SBC Illinois' obligations under the contract change as the legal requirements of those rules and orders change – precisely what XO suggests may not occur. Similarly, in Section 1.4, XO proposes new contract language to govern the situation where "a change in Applicable Law" requires the provision of a UNE "that is not offered under the Amended Agreement," instead of leaving such changes to be governed by the parties' existing change of law language. And in Sections 3.5.2.3 and 3.5.3.7, XO proposes language to govern future state commission and FCC determinations regarding the unbundling of DS1, DS3, and dark fiber dedicated transport, again instead of relying on the parties' existing change of law language.[16]

[16] XO's language in these latter sections is particularly inappropriate because XO proposes to give orders requiring the unbundling of dedicated transport facilities immediate effect, while giving state commission or FCC orders determining that such facilities are not required to be unbundled effect only after such orders are "final and non-appealable" – perhaps years later. XO cannot have it both ways. Moreover, such language is unreasonable. In the *TRO*, the FCC directed parties to implement its new rules notwithstanding any "final and nonappealable" language, concluding that "[g]iven that the prior UNE rules have been vacated and replaced today by new rules, we believe that it would be unreasonable and contrary to public policy to preserve our prior rules for months or even years pending any reconsideration or appeal of this Order." *TRO*, ¶ 705. The same holds true of the new dedicated transport rules that the FCC will issue on remand from *USTA II*; just as it was unreasonable and contrary to public policy to delay implementation of the FCC's dedicated transport rules in the *TRO*, so would it be unreasonable and contrary to public policy to delay implementation of the dedicated transport unbundling requirements it will promulgate on remand. XO's proposed "final and nonappealable" language also constitutes a distinct, and significant, change from the parties' existing change of law language.

In short, XO's suggestion that SBC Illinois' proposed contract language "change[s] the change of law language" is merely a red herring, because, whether or not XO's characterization of that language is correct, XO's proposed contract language would have the same effect. Thus, XO's assertions regarding changes to change in law language should be entirely ignored.

In any event, SBC Illinois' proposed language is necessary to implement the requirements of the *TRO*. The *TRO* clearly "declassifies" some network elements, including enterprise switching, OCn loops, OCn dedicated transport, entrance facilities, packet switching, and call-related databases (except 911 and E911 databases) wherever the ILEC is not required to provide unbundled switching. *See TRO*, ¶ 7. The most immediate issue raised by these declassifications is whether the contract should obligate SBC Illinois to provide these declassified elements at the same rates, terms and conditions as they were offered before they were declassified. Clearly the contract should contain no such obligations. And SBC Illinois' proposed "lawful UNE" language makes clear that the contract contains no such obligations, by defining these network elements as "declassified" rather than as "lawful UNEs."[17]

ISSUE SBC-2:

(a) What is the appropriate transition and notification process for UNEs that no longer have to be unbundled?

(b) Under the TRO, may either party change the change of law language?

Issue SBC-2, like Issue SBC-1, concerns several related contract provisions, but again presents a single overriding issue: the appropriate transition process for network elements that

[17] XO's suggestion that SBC Illinois' proposed language impermissibly modifies the parties' existing "change of law" provisions to the extent it may apply to future changes in the status of particular network elements as "UNEs" is addressed below under related Issue SBC-2, which concerns the appropriate transition and notification processes for UNEs that have been declassified.

have been "declassified" (or what XO calls "nonconforming" facilities). SBC Illinois' proposed language provides a clear, orderly, and well-defined transition process for such declassifications. XO, on the other hand, proposes a vague process that consists of little more than additional negotiations and arbitrations down the road. XO's proposal must be rejected, because, pursuant to the *TRO*, the purpose of *this* negotiation and arbitration is to establish the appropriate transition procedures, not to delay the creation of such procedures in favor of future negotiations and arbitrations. Instead, the Commission should adopt SBC Illinois' proposed contract language.

SBC Illinois' proposed contract language begins by defining "declassified" facilities as those which SBC Illinois was previously providing as a UNE "but which SBC Illinois is no longer obligated to provide on an unbundled basis under 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51," or that is no longer a "lawful UNE." SBC Ill. Sections 2.20, 1.3. The declassification language also expressly recognizes that a facility may be declassified only on a "route-specific or geographically-specific basis" – that is, a network element may be removed from the list of UNEs only for particular geographic markets. SBC Ill. Section 1.3.1. SBC Illinois' proposed contract language also identifies the particular network elements that have been declassified by the *TRO* and *USTA II*, such as entrance facilities, enterprise switching, EELs that do not meet the FCC's new eligibility criteria, certain call-related databases in cases where the CLEC provides its own switching, packet switching, OCn loops, and OCn dedicated transport. SBC Ill. Section 1.3.1.1. The contract provisions again specify that these facilities are no longer "lawful UNEs," are not required to be provided as section 251 UNEs, and instead are subject to the transition procedures of the contract. SBC Ill. Sections 1.3.1.3, 1.3.2, and 1.3.3.

SBC Illinois' proposed transition procedure language provides that, where a facility has been declassified, SBC Illinois must provide the CLEC written notice of its intent to discontinue providing the facility as a section 251 UNE under the contract. SBC Ill. Section 1.3.4. SBC Illinois will continue to provide the facility under the terms of the contract for the next 30 days, during which time the CLEC will cease submitting new orders for the declassified facility, and can issue a disconnect order for the existing declassified facilities if it so chooses. If the CLEC does not issue disconnect orders, then the parties "may agree upon another service arrangement or element (e.g. via a separate agreement at market-based rates or resale), or may agree that an analogous access product or service may be substituted." SBC Ill. Section 1.3.4(b). In the event the parties fail to agree, SBC Illinois may convert the declassified facility to an analogous resale or access service, if available. For example, if a CLEC is purchasing UNE-P and the switching component of that combination is no longer a UNE, the CLEC could convert to a resale arrangement. Similarly, if a CLEC is purchasing a high capacity DS1 loop, and DS1 loops are declassified, that CLEC could convert to a special access arrangement. These contract provisions provide an appropriate, well-defined process for transitions, intended to minimize disruptions and disputes.

XO has not presented any reasoned objection to SBC Illinois' proposed contract provisions to the extent they apply to the network elements clearly declassified by the *TRO* (*e.g.*, enterprise switching and OCn loops and transport), but instead points out that the language would apply to future declassifications as well. XO asserts that the latter would constitute an impermissible modification of the existing change of law process. But the ALJ has already stricken SBC Illinois' proposed language in Section 2.20(e) that would apply the declassification provisions to future non-*TRO* or *USTA II*-related declassifications. And to the extent that SBC

Illinois' proposed language would apply on a forward-looking basis to *TRO* or *USTA II*-related declassifications,[18] it does not constitute an impermissible change to the existing "change in law" provisions.

The "change in law" that precipitated the *TRO* and its new unbundling rules was the D.C. Circuit's holding in *USTA I* that in the *UNE Remand Order* the FCC had adopted an unlawful interpretation of the "impairment" standard by ignoring market-specific variations in impairment. In the *TRO*, the FCC adopted a new interpretation of the "impairment" standard, and then proceeded to apply that standard (or delegate such application to the state commissions) to particular network elements. And while the D.C. Circuit disagreed with some of the FCC's applications, and its attempt to delegate to state commissions the authority to apply the impairment standard, the D.C. Circuit did not disturb the FCC's new "impairment" standard. *USTA II*, 359 F.3d at 572. Thus, on remand from *USTA II*, while the FCC will have to reapply its impairment standard to some network elements, there will be no change in law with respect to the impairment standard itself.

Moreover, even if SBC Illinois' language, like XO's language, did in some respect operate to modify the parties' existing change in law process with respect to *TRO* and *USTA II*-related UNE declassifications, there is nothing untoward about such a result. As XO notes, in the *TRO* the FCC held that it would not "unilaterally" change all interconnection agreements to incorporate its new rules, but directed carriers to use the existing change in law provisions in their contracts. That is precisely what occurred here (except, of course, for XO's attempt to

[18] *See* ALJ Order at 2-3 ("Regarding future declassifications, a forward-looking process is not unrelated to implementation of the TRO (as modified by USTA II), to the extent that such process is designed to apply the modified TRO's principles and conclusions to future activity.").

bring this arbitration under section 252) – the parties invoked their change of law provisions, and negotiated new language to implement the requirements of the *TRO*. Nothing in the *TRO* prevents the parties from modifying their existing change of law process (after first invoking the existing change of law process), if such modifications are consistent with implementing the requirements of the *TRO*. In other words, to the extent the *TRO* created a new legal landscape which the parties' existing change of law language is insufficient to reasonably and properly implement, then invoking the existing change of law process to negotiate a new change in law process that will accommodate the new legal landscape is perfectly appropriate.

That is precisely the case here (to the extent that XO's and SBC Illinois' proposed language can even be deemed to modify the existing change of law process at all). One change in law at issue here – the extinguishment of the *UNE Remand Order* by the *TRO* – created a sea change with respect to unbundling. Prior to the *TRO*, and under the law upon which the parties' existing contract was based, the FCC had interpreted the 1996 Act so as to promulgate static, unnuanced unbundling requirements that designated a particular network element as a UNE (or not) on a nationwide basis. In the *TRO*, however, and in accordance with the D.C. Circuit's *USTA I* decision, the FCC promulgated a new legal interpretation of the unbundling standard under which a single element may or may not be a UNE at different times and at different geographic locations.

Under the change in law effected by the *TRO*, the status of a network element as a "UNE" is subject to frequent change, and on a very minute geographic, customer class, or service-specific basis. *See TRO*, ¶ 118 ("we will apply several types of granularity in our unbundling analysis, including consideration of customer class, geography, and service"). The

parties' existing change of law language cannot appropriately accommodate this shifting UNE landscape.

For instance, the *TRO* anticipated that some network elements, like high-capacity loops and dedicated transport, will gradually be declassified over time for particular, granular geographic locations.[19] Treating each successive declassification as a separate "change of law" event, as XO suggests, simply makes no sense. As a legal matter, it is not clear whether the existing change of law provisions would even apply to such successive declassifications. For instance, assume the FCC's unbundling rules for high-capacity loops call for the periodic application of trigger and/or potential deployment tests, which would result in the periodic identification of additional locations where high-capacity loops are no longer UNEs. XO suggests that in these circumstances the parties should invoke the change of law process for each successive declassification, to incorporate those results into the interconnection agreement, rather than establish a uniform procedure to apply to each. But it is not clear that the successive non-impairment findings would each constitute a new, independent change of law event. Rather, the "change in law" might simply be the promulgation of the FCC's high-capacity loop rules, which are then implemented – but not "changed" again – via successive non-impairment findings. SBC Illinois' proposed language sweeps this confusion away, by defining such events as "declassifications," and establishing a uniform implementation and transition procedure for every declassification.

Further, as a practical matter, it would make little sense for the parties to re-negotiate each time a UNE is declassified for a particular geographic location. Rather, a concrete, pre-

[19] While the FCC's dedicated transport and high-capacity rules were ultimately vacated by the D.C. Circuit, those rules are still instructive regarding the new impairment and unbundling regime created by the FCC.

determined declassification process should apply each time, for instance, dedicated transport or high-capacity loops are declassified with respect to a new geographic area. And SBC Illinois' proposed language works equally well for clear, one-time declassifications (*e.g.*, enterprise switching). The language does not require lengthy and likely contentious negotiations. Instead, the parties' agreement will appropriately recognize valid declassification decisions and set a course for implementation that will impose minimal demands on the resources of the Commission and Staff.

Indeed, XO's own proposed contract language demonstrates the inadequacy of the parties' existing change of law provisions to accommodate future declassifications in light of the new unbundling regime created by the *TRO*. XO itself, instead of relying on the existing change of law process, proposes new contract provisions that would apply to *future* declassifications made by the ICC "after the Effective Date" of the parties' contract amendment. XO Section 3.13.2. In light of XO's own proposal to replace the existing change of law process with specific contract provisions to govern some future declassifications, XO's "change in change of law" argument should be disregarded.

Finally, XO's proposed transition language is clearly inappropriate, as well as unlawful. For instance, XO proposes to exclude section 271 checklist items from the category of "nonconforming" facilities (what SBC Illinois' language calls "declassified" facilities), instead requiring such items to be provided on the same rates, terms, and conditions as section 251 UNEs. As explained above under Issue SBC-1, that proposal is flatly contrary to law, and is also a matter outside the Commission's jurisdiction.

For "network elements that are Nonconforming Facilities as of the effective date" of the parties' contract amendment (*i.e.*, those network elements that were declassified by the *TRO*, like

"OCn loops and transport"), XO proposes that the transition "be handled on a project basis." XO Section 3.13.1.1. Under XO's proposal, the parties would then "agree to establish a transition schedule" within the longer of 90 days or "the period dictated by the terms of the Agreement" (whatever that may mean), and if the parties are "unable to agree on a schedule within such period, then either Party may utilize the dispute resolution procedures set forth in the Amended Agreement." *Id.* XO's proposal should be rejected, because in essence it fails to establish any real transition period at all, but seems intended to delay implementation of the declassifications established by the *TRO.*

In effect, XO's proposed language says nothing more than the parties will attempt *in the future* to negotiate a transition schedule, and will again seek Commission intervention when they fail to agree. (The latter is almost certain to occur; the parties obviously were not able to agree on a transition schedule previously (hence this arbitration), and XO is apparently unwilling to even *propose* a concrete transition schedule, and there is no reason to think future negotiations will be any more successful.) But, under the *TRO*, the parties must establish a transition schedule *now*; XO cannot delay implementation of the *TRO*'s declassifications indefinitely by calling for additional negotiation and state commission dispute resolution, which would likely delay implementation of the *TRO* for many more months.

SBC Illinois has been operating for years under unlawfully permissive unbundling regimes (the *First Report and Order* and the *UNE Remand Order*), and XO has enjoyed years of unbundled access to facilities, like OCn loops and transport, that were never lawfully UNEs, and that the FCC has now conclusively established are *not* UNEs. Dragging out the transition process for these declassified facilities for at least several (or, more likely, many) months more

(during which time XO will continue to enjoy access to these facilities as UNEs) is contrary to public policy and to the FCC's direction in the *TRO*.

The FCC concluded that "[g]iven that the prior UNE rules have been vacated and replaced today by new rules, we believe that it would be unreasonable and contrary to public policy to preserve our prior rules for months or even years pending any reconsideration or appeal of this Order." *TRO*, ¶ 705. Thus, the *TRO* directed carriers to immediately begin negotiations to implement its new rules upon the effective date of the *TRO*. XO's attempt to "preserve [the FCC's] prior rules for months" more pending *more* negotiation and state commission dispute resolution is, in the FCC's words, "unreasonable and contrary to public policy."

Moreover, there is no need for a lengthy transition process to govern the transition of the network elements declassified by the *TRO*, like OCn loops and transport. XO has already been afforded a "transition period" that began more than *9 months ago*, on October 2, 2003, when the *TRO*, and its declassification of facilities like OCn loops and transport, became effective. The FCC recognized that there would be a "lag involved in negotiating and implementing new contract language" to implement the *TRO*, and concluded that "the practical effect of this negotiation of new terms may be that parties are provided a transition period." *TRO*, ¶ 701. The FCC was correct; as a result of the lag, XO has already been provided a transition period of more than 8 months, during which time it has enjoyed unbundled access to facilities that are no longer UNEs. XO should not be allowed to delay the creation of a final, concrete transition period for many months more. Rather, the parties' contract should, like SBC Illinois' proposed language, establish a tangible, binding deadline for the transition of facilities that are no longer UNEs.

XO's proposed contract language governing network elements deemed "nonconforming facilities" by the Commission after the effective date of the parties' contract amendment is

similarly flawed. With respect to such declassifications, XO proposes merely that "the Parties agree to amend the Agreement promptly to reflect the change and establish a mutually acceptable transitional mechanism." XO Section 3.13.2. Negotiating to "amend" the agreement every time a successive declassification occurs is unreasonable and inefficient. Rather, the contract should provide for a concrete, well-defined process that applies equivalently to each successive declassification. The parties should not have to re-invent the wheel each time a declassification occurs. Nor should the Commission be forced to conduct another dispute resolution proceeding for each declassification, as would likely occur under XO's proposal.

ISSUE SBC-3: Loops

(a) When SBC Illinois retires copper loops or subloops must it provision an alternative service over any available facility?

(b) Should the ICA include terms and conditions related to the loop "caps" set forth in 47 C.F.R. § 51.319(a)(5)(iii)?

(c) Should the pricing appendix contain pricing for declassified subloops?

Issue SBC-3 concerns contract language governing the provision of UNE loops. The parties' competing language presents three discrete disputes, addressed in turn below.

First, the parties do not agree concerning the proper language to implement the *TRO*'s requirements with respect to the retirement of copper loops or subloops that have "been replaced with an FTTH [fiber-to-the-home] loop." Pursuant to the Act, the FCC had previously established rules requiring ILECs to "provide public notice of any network change that will affect a competing carrier's performance or ability to provide service." *TRO*, ¶ 281. In the *TRO*, the FCC held that retirements of copper loops that are replaced with FTTH loops are also subject to these "network disclosure rules," FCC Rules 325-335, with two modifications: (1) the FCC established a "right for parties to object to the incumbent LEC's proposed retirement of its

copper loops for both short-term and long-term notifications," when, "[b]y contrast, our disclosure rules for other network modifications permit oppositions only for instances involving short-term notifications"; and (2) the FCC "establish[ed] a mechanism to deny such objections automatically unless the [FCC] rules otherwise within 90 days of the [FCC's] public notice of the intended retirement." *Id.*, ¶ 283. The FCC codified these new requirements in FCC Rule 333(b), (c), and (f).

Both XO and SBC Illinois propose to implement these new FCC rules in Section 3.3.1.5 of the parties' contract, to require SBC Illinois, before it retires any copper loops or subloops that have been replaced with FTTH loops, to "comply with (a) the network disclosure requirements set forth in Section 251(c)(5) of the Act and in section 51.325 through section 51.335 of the FCC's rules, and (b) any applicable state requirements." XO, however, proposes to add an additional requirement that SBC Illinois "provision an alternative service over any available, compatible facility (e.g., copper or fiber) to CLEC or its end user" before any such retirement. XO Section 3.3.1.5. The purpose of this language is apparently to require SBC Illinois to develop new offerings for CLECs before it can retire copper loops. This provision finds no support in the *TRO*.

The FCC's network disclosure rules are just that – *disclosure* rules that require an ILEC to provide certain disclosures before making certain network changes. They do not create new unbundling requirements or require the provisioning of "alternative services." And while, as XO notes, the FCC stated that "[s]uch notifications will ensure that incumbent and competitive carriers can work together to ensure the competitive LECs maintain access to loop facilities"

(*TRO*, ¶ 281), the FCC did *not* make that a prerequisite to the retirement of facilities.[20] Rather, the FCC held that "incumbent LECs may remove copper loops from their plant so long as they comply with our Part 51 network notification requirements." *TRO*, n.847.

Second, the parties do not agree regarding the proper language in Section 3.1.2.2.1 of the contract amendment to implement the *TRO*'s DS3 loop caps. In the *TRO*, the FCC held that "we limit an incumbent LEC's unbundling obligation to a total of two DS3s per requesting carrier to any single customer location," because "as a carrier approaches customer demand for three DS3s of capacity at a particular customer location, it is feasible for that carrier to self-deploy its own high-capacity facilities." *TRO*, ¶ 324. This requirement is codified in FCC Rule 319(a)(5)(iii). XO proposes to include a bare-bones recitation of this requirement in the parties' contract, while SBC Illinois proposes to include some additional language clarifying the application and effect of the new rule. SBC Illinois' proposed language more appropriately implements the FCC's rule into the commercial environment, avoids disputes that would otherwise inevitably arise in the future, and should be adopted.[21]

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[20] Nor could it. Section 251(c)(5) of the 1996 Act, which the FCC implemented in these rules, requires only that ILECs "provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities or networks." It does not require ILECs to comply with any alternative service provisioning requirements before making such network changes.

[21] As noted above, there is currently no FCC rule requiring access to high-capacity loops, because the D.C. Circuit vacated that rule. The "UNE declassification" language proposed by SBC Illinois is designed to accommodate that fact by restricting SBC Illinois' unbundling obligations to those network elements that the FCC says must be unbundled in valid, effective rules. The parties negotiated before the D.C. Circuit's mandate issued, and SBC Illinois proposed contract language which SBC Illinois now regards as outdated and superfluous (*i.e.*, certain language addressing high-capacity loops, dedicated transport, and mass market switching), and SBC Illinois is willing to delete that language from its contract proposal. There is no need to do so, however, as long as SBC Illinois' proposed language regarding its obligation to provide access only to those specific elements that the FCC has found in valid and lawful rules must be unbundled is adopted (*see* Issues SBC-1 and SBC-2). If SBC Illinois' proposed "UNE declassification" language is not adopted, however, then SBC Illinois is unwilling to agree to language providing access to high-capacity loops, and would withdraw that language.

For instance, SBC Illinois proposes to clearly state in Section 3.1.2.2.1 that the DS3 loop cap applies to each "end user customer premises location." Because the bare term "customer" can be ambiguous (*e.g.*, both XO and its end user customers are "customers"), this clarification will reduce the potential for confusion and future disputes. Moreover, XO has not articulated any reasoned objection to this language.

Similarly, SBC Illinois proposes to clearly state in Section 3.1.2.2.1 that, as a result of the DS3 loop cap, if XO "has already obtained two of these types of loops at the same end user customer premises location," then SBC Illinois can reject any orders from XO for an additional DS3 loop at the same end user customer premises location, or it may accept the order but provision the third DS3 loop as a special access circuit instead of as a UNE. Again, XO has not articulated any reasoned objection to this language. This language should not be controversial, because it merely implements the DS3 loop cap. It also reduces the potential for confusion and future disputes under the contract, by specifying SBC Illinois' rights in the event that XO attempts to place a DS3 loop order that violates the cap. For instance, in the absence of SBC Illinois' proposed language, SBC Illinois' rights in the event XO placed an order for a third DS3 loop would not be entirely clear. Could SBC Illinois reject the order? Would SBC Illinois be required to place the order and then pursue XO for breach of contract? Would SBC Illinois be required to pursue dispute resolution, or file a complaint against XO with the Commission or the FCC for violating the FCC's rule and the parties' contract?

SBC Illinois' proposed language also provides that, in the event that SBC Illinois for some reason (*e.g.*, by mistake) does accept an XO order for a third DS3 loop at a single location, that does not mean that SBC Illinois has waived its right to enforce the cap with respect to future orders. SBC Ill. Section 3.1.2.2.1. That is, in such an event XO is not then automatically

entitled to retain that third DS3 loop as a UNE or to place an order for a 4th, 5th, 6th, etc., DS3 loop at the same location. Again, XO has not articulated any reasoned objection to this proposed contract language, and the Commission should approve SBC Illinois' proposed language.

Third, the parties disagree regarding SBC Illinois' proposal to delete the subloop pricing for three subloops: CO to RT, CO to SAI, and CO to terminal. Pricing Appendix, lines 108-73. XO asserts in its preliminary position statement that these prices should not be deleted "unless it is part of [SBC's] fiber feeder and is not necessary to complete the transmission path between the customer's premise and the central offices." XO has the first part right, and the second part wrong.

In the *TRO*, the FCC held that ILECs must unbundle "copper subloops, *i.e.*, the distribution plant consisting of the copper transmission facility between a remote terminal and the customer's premises." *TRO*, ¶ 253. But, the FCC held, "we do not require incumbent LECs to provide access to their fiber feeder loop plant on an unbundled basis as a subloop UNE." *Id.* The three subloops at issue are all part of SBC Illinois' *feeder* plant, not its copper *distribution* plant, and thus SBC Illinois is not required to provide these three subloops as UNEs.

XO's suggestion that SBC Illinois must retain these subloop prices where the subloops are "necessary to complete the transmission path between the customer's premise and the central offices" is without merit. The FCC did not impose any such requirement. And such a requirement would not make any sense. Feeder facilities are nearly always required to complete the transmission path, because without feeder facilities all that is left is a distribution facility

running from the customer premise to a remote terminal. Thus, XO's proposal would render the FCC's holding that ILECs need not unbundle feeder subloops a complete nullity.[22]

ISSUE SBC-4: Advanced Services

(a) What terms and conditions should apply to hybrid loops?

(b) What terms and conditions should apply to Line Conditioning?

(c) What terms and conditions should apply to the HFPL?

Issue SBC-4 (advanced services) concerns implementation of the *TRO*'s requirements with respect to hybrid loops, line conditioning, and the high frequency portion of the copper loop ("HFPL").

Hybrid Loops (Issue SBC-4(a)). In the *TRO*, the FCC created new unbundling requirements with respect to "hybrid loops," which the FCC defined as "a local loop composed of both fiber optic cable, usually in the feeder plant, and copper wire or cable, usually in the distribution plant." FCC Rule 319(a)(2). The FCC created different requirements with respect to (1) the "packet switching facilities, features, functions, and capabilities" of hybrid loops (which ILECs are "not required to provide" under any circumstances); (2) access to hybrid loops where the CLEC "seeks access . . . for the provision of broadband services" (in which case the ILEC must provide access to the "time division multiplexing [TDM] features, functions and capabilities of that hybrid loop, including DS1 or DS3 capacity (where impairment has been

[22] While it is not entirely clear, XO may be relying on a sentence from paragraph 253 of the *TRO*, where the FCC stated: "As explained below, in light of our decision to refrain from unbundling the packetized capabilities of incumbent LECs, incumbent LECs will provide access to their fiber feeder plant only to the extent their fiber feeder plant is necessary to provide a complete transmission path between the central office and the customer premises *when incumbent LECs provide unbundled access to the TDM-based capabilities of their hybrid loops.*" (Emphasis added.) But even in those circumstances, the FCC did not require ILECs to provide a stand-alone feeder subloop. Rather, it required ILECs to provide "an *entire* non-packetized transmission path capable of voice-grade service (*i.e.*, a circuit equivalent to a DS0 circuit) between the central office *and the customer's premises*." *TRO*, ¶ 296 (emphasis added). Thus, there is no reason to maintain the separate prices for these feeder subloops.

found to exist)" to establish a "complete transmission path"); and (3) access to hybrid loops where the CLEC "seeks access . . . for the provision of narrowband services" (in which case the ILEC must provide access "to an entire hybrid loop capable of voice-grade service . . . using [TDM] technology" *or* "to a spare home-run copper loop"). FCC Rule 319(a)(2)(i), (ii), and (iii).

SBC Illinois proposes that the contract language dealing with hybrid loops track the very specific language of the FCC's actual rule. *See, e.g.*, SBC Ill. Section 3.1.4. XO, on the other hand, proposes that "SBC Illinois shall be required to provide[] nondiscriminatory access to hybrid loops on an unbundled basis, including narrowband and/or broadband capabilities, pursuant to Applicable Law, including, but not limited to, Section 271 of the Act and state law." XO Section 3.1.4.1. This vague and unlawful language should be rejected.

The FCC, after carefully assessing and balancing potential "impairment" against "the explicit congressional goal of promoting the rapid deployment of advanced services," determined that its specific hybrid loop unbundling rules "best address[] the impairment in a manner that advances other goals of the Act." *TRO*, ¶¶ 285-86. In particular, the FCC weighed possible impairment, "the state of intermodal competition," "the effect of alternatives to mandating unbundled access," and "the costs of unbundling, *i.e.*, whether refraining from unbundling requirements will stimulate facilities-based investment and promote the deployment of advanced telecommunications infrastructure," to "adopt a national approach that relieves incumbent LECs of unbundling requirements for the next-generation network capabilities of their hybrid loops, while at the same time ensures requesting carriers have access to the transmission facilities they need to serve the mass market." *Id.*

These specific hybrid loop unbundling rules must be reflected in the parties' contract. As the FCC held, "[i]f a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment – and thus has found that unbundling that element would conflict with the limits in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and 'substantially prevent' implementation of the federal regime, in violation of [the Act]." *Id.* ¶ 195. Here, an attempt to require the unbundling of hybrid loops in circumstances where the FCC held unbundling is not required would fatally conflict with, and prevent implementation of, the FCC's hybrid loop unbundling regime. The FCC carefully crafted those rules so as to balance an unbundling requirement with "the explicit congressional goal of promoting the rapid deployment of advanced services." *Id.*, ¶ 285. The Commission should decline XO's invitation to "thwart" this "federal policy" and "federal regime," because that would run afoul of "long-standing federal preemption principles." *Id.* ¶ 192.

The Commission must also reject XO's proposal to require hybrid loops to be provided at section 251 UNE rates, terms, and conditions "pursuant to . . . Section 271 of the Act." As explained above under Issue SBC-1, that proposal is flatly contrary to law, and is also a matter outside the Commission's jurisdiction.

Line Conditioning (Issue SBC-4(b)). Line conditioning is "the removal from a copper loop or copper subloop of any device that could diminish the capability of the loop or subloop to deliver high-speed switched wireline telecommunications capability, including digital subscriber line [DSL] service." FCC Rule 319(a)(1)(iii)(A). While the parties largely agree on the proper contract language to implement this requirement, XO opposes some of the language proposed by SBC Illinois. XO's objections are without merit.

First, XO opposes language clarifying that the contract's reference to FCC Rule 319(a)(1)(iii)(B) (a reference to which XO agrees) means "the FCC's lawful and effective rule 47 C.F.R. Section 51.319(a)(1)(iii)(B), as such rule may be modified from time to time." *See* SBC Ill. Section 3.2.1. While XO has not explained its objection to this language, this language merely clarifies how the reference to the FCC Rule is to be interpreted, to avoid potential disputes in the future.

Second, XO opposes language stating that the conditioning rates for the removal of excessive bridge taps, load coils, and repeaters are set forth in the pricing schedule, an that the parties will attempt to negotiate rates for other conditioning activities. SBC Ill. Section 3.2.1. XO offers no explanation for its dispute with this language, and does not propose any new rates. Moreover, there is no basis in the *TRO* for changing existing loop conditioning rates established by the Commission for the removal of excessive bride taps, load coils, and repeaters. Thus, SBC Illinois' proposed language should be adopted.

Line Sharing (HFPL) (Issue SBC-4(c)). SBC Illinois' proposed contract language properly implements the *TRO*'s new line sharing rules, while XO's language does not.

In the *TRO*, the FCC promulgated new rules to govern the provision of the HFPL, or line sharing, and in *USTA II* the D.C. Circuit upheld the FCC's new rules. The FCC held that "incumbent LECs do not have to provide unbundled access to the high frequency portion of their loops." *TRO*, ¶ 7. The FCC found that any requirement to unbundle the HFPL is inconsistent with the 1996 Act's unbundling standards and overall goals, and thus the HFPL is not subject to unbundling. *TRO*, ¶¶ 258-63; 47 C.F.R. § 51.319(a)(1)(i) ("Beginning on the effective date of the Commission's Triennial Review Order, the high frequency portion of a copper loop shall no longer be required to be provided as an unbundled network element * * *."). As the FCC

explained, the HFPL cannot be required to be unbundled because CLECs are not "impaired" by a lack of access to the HFPL, in that they have alternative sources of supply that "create[] better competitive incentives than [unbundling]." *TRO*, ¶¶ 258-60.

The FCC also created specific rules to govern the phase-out of the HFPL. Under this "three-year transition," for the first year, from October 2, 2003 to October 2, 2004, CLECs "may continue to obtain new line sharing customers through the use of the HFPL at 25 percent" of the applicable recurring unbundled loop rates. *Id.* ¶ 265. "During the second year, the recurring charge for such access for those customers will increase to 50 percent" of the loop rate, and "in the last year of the transition period" the rate "will increase to 75 percent." *Id.* "After the transition period, any new customer must be served through a line splitting arrangement, through the use of the stand-alone copper loop, or through an arrangement that a competitive LEC has negotiated with the incumbent LEC to replace line sharing." *Id.*

The FCC also created rules to govern pre-existing line sharing arrangements. In particular, the FCC held that all such arrangements would be "grandfathered" at existing rates "until the next biennial review," "unless the respective competitive LEC, or its successor or assign, discontinues providing xDSL service to that particular end-user." *Id.* ¶ 264.

The FCC codified all these HFPL requirements in its rules (FCC Rule 319(a)), and made clear that ILECs are not required to provide the HFPL *"except as specified*." *Id.* ¶ 255 (emphasis added). Thus, the parties' contract must incorporate these new requirements of federal law.

SBC Illinois proposes detailed contract language that precisely mirrors the FCC's new HFPL rules and its grandfathering and transition period requirements. SBC Ill. Sections 3.10.1 – 3.10.3. XO has not identified any objection to SBC Illinois' proposed language, or asserted that

that language somehow fails to properly implement the FCC's requirements. Thus, the Commission should adopt SBC Illinois' proposed language.

While XO did not originally present any HFPL-related contract language to the Commission in its arbitration petition, XO subsequently provided competing HFPL language, consisting of a few short sections. XO Sections 1.19.1 - .4. That language, however, fails to implement the HFPL requirements of the *TRO*, and is unlawful.

XO proposes to define as "grandfathered" line sharing arrangements any arrangements that are "in place" as of the date of the parties' contract amendment, provided that the "CLEC acquired the end user customer . . . with the intent to use Line Sharing, prior to October 2, 2003." XO Section 1.19.1.4. That language violates federal law. The FCC's HFPL rule provides that a grandfathered line sharing customer exists only where the CLEC "*began providing* digital subscriber line service" to a customer "*prior to* the effective date of the Commission's Triennial Review Order [October 2, 2003]." FCC Rule 319(a)(1)(i)(A) (emphasis added). Thus, the CLEC's "intent" to use line sharing is irrelevant.

XO's proposed language also violates federal law with respect to *new* line sharing arrangements. XO proposes to exclude any specific language mirroring the FCC's specific transition period requirements, but instead would vaguely state that SBC Illinois "shall provide new Line Sharing arrangements on a transitional basis pursuant to the rates, terms and conditions prescribed by the FCC in the Triennial Review Order and 47 C.F.R. Part 51." XO Section 1.19.1.3. While that proposed language is merely unreasonably vague, and probably not unlawful, XO's punchline – that SBC Illinois shall *also* provide line sharing "as otherwise required by Applicable Law (including, but not limited to, 47 U.S.C. § 271 and State law)" affirmatively violates federal law. XO repeats its reference to section 271 and state law twice

more, in Sections 1.19.1.1 and 1.19.1.2. In each instance, that proposed language must be rejected.

With respect to section 271, as noted above, the FCC held in the *TRO* that section 271 checklist items are *not* subject to the same rates, terms, and conditions as section 251 UNEs. Moreover, as noted above, the Commission lacks jurisdiction to address the rates, terms, and conditions for section 271 checklist items. And there is a third flaw with XO's section 271 proposal – *the HFPL is not even a checklist item*.

Nor can the HFPL be unbundled under state law, as XO suggests. The FCC held that any requirement to unbundle the HFPL is inconsistent with the unbundling standards of the 1996 Act and Congress' overall goals. As the FCC explained, the HFPL cannot be required to be unbundled because CLECs are not "impaired" by a lack of access to the HFPL, in that they have alternative sources of supply (such as leasing an entire loop from the incumbent LEC or obtaining an HFPL from other CLECs) that "create[] better competitive incentives than [unbundling]." *TRO*, ¶¶ 258-60. The FCC also concluded that:

> requiring line sharing may skew competitive LEC's incentives toward providing a broadband-only service to mass market consumers, rather than a voice-only service or, perhaps more importantly, a bundled voice and xDSL service offering. In addition, [unbundling the HFPL] would likely discourage innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs' and the competitive LECs' offerings. We find that such results would run counter to the statute's express goal of encouraging competition and innovation in all telecommunications markets. *Id.* ¶ 261.

Thus, the FCC concluded, not only are CLECs not "impaired" without access to the HFPL, but "the costs of unbundling the HFPL outweigh the benefits when taking into account the skewed entry incentives" that unbundling the HFPL would cause. *Id.* ¶ 263. Rather than

require the immediate halt of HFPL provisioning, the FCC created a specific federal "transition" regime to govern the phase-out of the provision of the HFPL as an unbundled network element over the next three years. *Id.* ¶¶ 264-69.

Any attempt to impose a different scheme, as XO suggests, would run afoul of the FCC's conclusion that an HFPL unbundling requirement is *"counter"* to Congress' *"express goal* of encouraging competition and innovation in all telecommunications markets." *TRO*, ¶ 261 (emphases added). In other words, an HFPL unbundling requirement directly conflicts with Congress' goal in the 1996 Act, and would thus be unlawful.

The FCC confirmed the preemptive effect of unbundling determinations like its HFPL determination in the *Triennial Review Order*. The FCC explained that in the *TRO* it was adopting a new "policy framework * * * based on carefully targeted impairment determinations," and that "setting a national policy for unbundling some network elements is necessary to send proper investment signals to market participants and to provide certainty to requesting carriers." *TRO*, ¶ 187. That national policy framework includes not only the UNEs that "must be unbundled," but "the network elements that must not be unbundled, in any market." *Id.* And "states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations" (*id.*), because that would destroy the integrity of this national policy framework.

The HFPL falls into the category of "network elements that must not be unbundled, in any market" (*TRO*, ¶ 187), because CLECs are not impaired without access to the HFPL and unbundling the HFPL would "skew competitive LEC's incentives" and run "counter" to Congress' "express goal of encouraging competition and innovation" (*id.* ¶ 261). With respect to such elements, the FCC explained that if a state commission were to "require the unbundling of a network element for which the [FCC] has * * * found no impairment," such as the HFPL, any

such requirement "would conflict with the limits set in section 251(d)(2)." *Id.* ¶ 195. The FCC also reiterated the well-established rule of federal preemption (that in cases of such conflict between federal law and state law on the same topic, the state-imposed requirement is preempted), and stated that "we believe it unlikely that such decision would fail to conflict with and 'substantially prevent' implementation of the federal regime." *Id.* ¶¶ 193-95.

Thus, as the California commission and State of California recently stated, "the FCC's *Triennial Review Order* * * * preempt[s] additional State unbundling requirements regarding line-sharing."[23] Similarly, in their briefs to the D.C. Circuit, NARUC, the Michigan commission, the California commission, and other state commissions conceded that:

- "The TRO * * * *Preempts* State Authority To Require Line-Sharing As A UNE And Set Line-Sharing Rates";[24]
- "The *TRO* * * * *precludes* States from requiring line-sharing as a UNE";[25] and
- "The TRO * * * unquestionably preempts the ability of the States to set line-sharing rates."[26]

And the FCC, in responding to arguments that the FCC's unbundling determinations should have no preemptive effect, made clear that its decisions on whether or not to unbundle a particular network element, such as the HFPL, do have binding, preemptive effect on the states: "In the UNE context, * * * a decision by the FCC not to require an ILEC to unbundle a particular element essentially reflects a 'balance' struck by the agency between the costs and benefits of

[23] People of the State of California and California Public Utilities Commission, Application for an Extension of Time to File a Petition for a Writ of Certiorari, at 3 (May 20, 2004).

[24] Brief for State Petitioners and Intervenors [including the California PUC], Case Nos. 00-1012, *et al*. (cons.) (D. C. Circuit, filed Dec. 1, 2003) at 9 (emphasis added) ("State Brief").

[25] *Id*. (emphasis added).

[26] Reply Brief for State Petitioners and Intervenors [including the California PUC], Case Nos. 00-1012, *et al*. (cons.) (D. C. Circuit, filed Jan. 12, 2004) at 9 (emphasis added) ("State Reply Brief").

unbundling that element. * * * *Any state rule that struck a different balance would conflict with federal law, thereby warranting preemption*."[27]

Other contract provisions. Under the Issue SBC-4 heading of the joint issues matrix submitted by the parties, XO attempts to introduce new contract language that has nothing to do with the issues raised by the parties in this arbitration. This language cannot even be considered by the Commission.

In response to XO's arbitration petition, SBC Illinois raised Issue SBC-4, addressing the terms and conditions for hybrid loops, line conditioning, and the HFPL. While XO had not previously identified these issues for arbitration (indicating it no longer wished its proposed language to be included in the parties' contract), XO subsequently provided its competing HFPL, hybrid loop, and line conditioning language, in the parties' joint issues matrix. However, XO also included proposed contract language in that matrix that has nothing to do with the HFPL, hybrid loops, or line conditioning issues raised by SBC Illinois. In particular, XO included proposed contract language addressing "line splitting" (XO Section 1.19.2 and subparts), the service degradation exception to loop conditioning (XO Sections 1.19.3, 1.19.4 and subparts), access to multiunit premises (XO Section 1.19.5), single point of interconnection (XO Section 1.19.6). technical feasibility (XO Section 1.19.7), and best practices (XO Section 1.19.8).

None of this proposed contract language bears on the arbitration issues raised by XO in its arbitration petition or by SBC Illinois in its response to that petition. And XO cannot introduce new issues into the arbitration by adding new contract language into a joint issues matrix. Section 252(b)(4)(A) of the Act provides that "[t]he State commission *shall* limit its

[27] Brief for Respondents [the FCC], Case Nos. 00-1012, *et al.* (cons.) (D. C. Circuit, filed Dec. 31, 2003) at 93 (emphasis added; citations omitted).

consideration of any [arbitration] petition . . . to the issues set forth in the petition and in the response." (Emphasis added.) Thus, the Commission must ignore, and cannot adopt, the additional language included by XO in the joint matrix.[28]

ISSUE SBC-5: Dark Fiber

What terms and conditions should apply to SBC Illinois' provision of Dark Fiber Loop and Dark Fiber Transport?

Issue SBC-5 concerns the contract provisions governing access to dark fiber loops and dark fiber transport.

SBC Illinois' proposed contract language provides that SBC Illinois will provide dark fiber loop and transport elements as UNEs to the extent they constitute "lawful" UNEs (*i.e.*, have not been declassified). *See* SBC Ill. Sections 2.6, 2.7, 3.1.6, 3.5.3, 3.5.3.1. As explained above in Issue SBC-1, this language appropriately reflects SBC Illinois' obligation to provide UNEs under the 1996 Act.[29]

XO's proposed language, on the other hand, would impermissibly require SBC Illinois to continue to provide unbundled access to dark fiber long after a finding that carriers are not

[28] Because XO's language does not relate to any issue raised by XO or SBC Illinois in this arbitration, SBC Illinois does not address the substance of that language at this time. Moreover, it is not clear whether XO will even attempt to support the substance of this proposed language in its opening brief. If it does not, then XO should be deemed to have waived any argument in support of the substance of this proposed language. If XO does address the substance of the language in its opening brief, then SBC Illinois reserves its right to rebut XO's arguments in its reply brief.

[29] There is currently no FCC rule requiring unbundled access to high-capacity loops or dedicated transport (including dark fiber), because the D.C. Circuit vacated those rules. The "UNE declassification" language proposed by SBC Illinois is designed to accommodate that fact by restricting SBC Illinois' unbundling obligations to those network elements that the FCC says must be unbundled in valid, effective rules. The parties negotiated before the D.C. Circuit's mandate issued, and SBC Illinois proposed contract language which SBC Illinois now regards as outdated and superfluous (*i.e.*, certain language addressing high-capacity loops, dedicated transport, and mass market switching), and SBC Illinois is willing to delete that language from its contract proposal. There is no need to do so, however, as long as SBC Illinois' proposed language limiting its obligation to provide unbundled access to network elements to only those specific elements that the FCC has found in valid and lawful rules must be unbundled is adopted (*see* Issues SBC-1 and SBC-2). If SBC Illinois' proposed "UNE declassification" language is not adopted, however, then SBC Illinois is unwilling to agree to, and would withdraw, language relating to high-capacity loops and dedicated transport that it originally proposed but which has been rendered outdated and superfluous by *USTA II*.

impaired. With respect to dark fiber transport, XO proposes simply that SBC Illinois must provide it "on an unbundled basis." XO Section 3.5.3.1. XO's language does not allow for any kind of declassification at all. That is unlawful, because SBC Illinois cannot be required to provide dark fiber transport on an unbundled basis to the extent it is not lawfully a UNE.

With respect to dark fiber loops, XO proposes that SBC Illinois be required to provide such loops "on an unbundled basis" until "a final and nonappealable order by the [ICC] or the FCC that requesting telecommunications carriers are not impaired without access to such Loops at such customer location." XO Section 3.1.6. That language also is inconsistent with the *TRO*. In the *TRO*, the FCC directed parties to implement its new rules notwithstanding any "final and nonappealable" language, concluding that "[g]iven that the prior UNE rules have been vacated and replaced today by new rules, we believe that it would be unreasonable and contrary to public policy to preserve our prior rules for months or even years pending any reconsideration or appeal of this Order." *TRO*, ¶ 705. So too would it be unreasonable and contrary to public policy to delay implementation of new impairment findings with respect to dark fiber loops, for perhaps years pending the final resolution of any appeals.

Moreover, to the extent XO intends its language to implement the *TRO*'s dark fiber loop rules (which direct state commissions to apply certain "trigger" and "potential deployment" tests to determine particular customer locations where CLECs are not impaired without access to dark fiber loops), XO's proposed language is contrary to those rules. In particular, FCC Rule 319(a)(6) provided that an ILEC "shall provide a requesting telecommunications carrier with nondiscriminatory access to a dark fiber loop on an unbundled basis *except where a state commission has found*, through application of the self-provisioning trigger . . . or the potential deployment analysis . . . that requesting telecommunications carriers are not impaired without

access to a dark fiber loop at a specific customer location." (Emphasis added.) In other words, under the FCC's rule, the ILEC's duty to continue providing unbundled access to dark fiber loops turns on a state commission finding. The FCC did *not* (though it could have) state that the ILEC's duty turns on a "final and nonappealable" state commission finding.

XO also opposes SBC Illinois' proposed contract language providing that SBC Illinois will offer dark fiber loops "when CLEC has collocation space in the SBC Illinois [central office] where the requested dark fiber terminates." SBC Ill. Section 3.1.6. But this language is supported by the *TRO*. As the FCC noted, "users of unbundled dark fiber provide the necessary optronics and collocations that are preconditions to activating the fiber to serve customers." *TRO*, ¶ 313. In other words, collocation is a "necessary" "precondition[]" to using a dark fiber loop. If XO does not collocate in a particular SBC Illinois central office, then it is unable to serve customers using dark fiber that terminates in that central office, in which case it makes no sense for SBC Illinois to offer XO unbundled dark fiber loops in that particular central office.

XO also opposes similar language proposed by SBC Illinois with respect to dark fiber transport, which states that SBC Illinois will offer dark fiber transport "when CLEC has collocation space in each SBC Illinois [central office] where the dark fiber(s) terminate." SBC Ill. Section 3.5.3.1. Again, this proposed language is directly supported by the *TRO*. "Dark fiber transport consists of unactivated optical interoffice transmission facilities." FCC Rule 319(e)(3). Thus, in order to use dark fiber transport, a CLEC must collocate at both ends and provide optronic equipment to activate the fiber. As the FCC held, "carriers that request dark fiber transport . . . *must* purchase and deploy necessary electronics *and collocations*." *TRO*, ¶ 382 (emphases added). *See also id.*, ¶ 381 ("Dark fiber transport is activated by competing carriers

using self-provided optronic equipment," and the use of dark fiber transport requires a CLEC to incur "the costs of collocation and electronics necessary to activate dark fiber").

Finally, XO opposes SBC Illinois' proposed language providing that dark fiber dedicated transport "does not include transmission facilities between the SBC Illinois network and the CLEC network or the location of CLEC equipment." SBC Ill. Section 3.5.3.1. Instead, XO proposes that "[t]he Parties acknowledge that the FCC redefined Dedicated Transport in the [*TRO*] to include the transmission facility or service between a SBC Illinois switch or wire center and another SBC Illinois switch or wire center." XO Section 3.5.2.1. XO's proposed language is misleadingly incomplete, and thus should be rejected.

The crucial point here is that the *TRO* redefined dedicated transport to include *"only"* the transmission facilities between ILEC switches. In the *TRO*, the FCC adopted a more "narrowly-tailored definition of the dedicated transport network element [that] includes *only* those transmission facilities *within* an incumbent LEC's transport network, that is, the transmission facilities between incumbent LEC switches." *TRO*, ¶ 366 (first emphasis added). By omitting the word "only," XO suggests that dedicated transport might also include other (unspecified) facilities besides the "transmission facilities between incumbent LEC switches." *Id.* That suggestion is directly contrary to the *TRO*, and thus unlawful.

Moreover, SBC Illinois' proposed language is necessary to implement the *TRO*'s new definition of dedicated transport. By redefining dedicated transport to include *"only . . .* the transmission facilities between incumbent LEC switches" (*id.*), the FCC made clear that the new definition *excludes* "transmission facilities that exist *outside* the incumbent LEC's network," such as "transmission links that . . . connect a competing carrier's network to the incumbent LEC's network." *Id.* (emphasis in original). "Accordingly, such transmission facilities are not

appropriately included in the definition of dedicated transport." *Id.* And accordingly, SBC Illinois' proposed definition in its proposed Section 3.5.3.1 must be adopted.

ISSUE SBC-6: Interoffice Facilities

(a) May XO obtain from SBC Illinois at TELRIC rates, Unbundled Interoffice Facilities (Dedicated Transport and/or Dark Fiber Transport) to connect the CLEC premises or Point of Presence (POP)?

(b) Is SBC obligated to provide TELRIC-based transmission facilities for interconnection and the exchange of traffic pursuant to Section 251(c)(2)?

(c) What terms and conditions should apply to the DS3 dedicated transport caps?

(d) Should the pricing schedule include pricing for entrance facilities, OC3, OC12 and OC48 dedicated transport, cross connects and multiplexing?

Issue SBC-6 (interoffice facilities) concerns the contract provisions governing dedicated transport. Several discrete disputes are involved.

First, XO objects to SBC Illinois' proposal to limit the provision of dedicated transport to instances where dedicated transport is a lawful UNE. SBC Ill. Section 3.5.1. Instead, XO proposes that the contract simply state that SBC Illinois shall provide dedicated transport regardless of whether it is actually a UNE or not, including under the purported authority of section 271. XO Section 3.5.1. XO's objection is without merit, for all the reasons discussed above under Issue SBC-1.[30]

[30] As noted above, there is currently no FCC rule requiring unbundled access to dedicated transport, because the D.C. Circuit vacated that rule. The "UNE declassification" language proposed by SBC Illinois is designed to accommodate that fact by restricting SBC Illinois' unbundling obligations to those network elements that the FCC says must be unbundled in valid, effective rules. The parties negotiated before the D.C. Circuit's mandate issued, and SBC Illinois proposed contract language which SBC Illinois now regards as outdated and superfluous (*i.e.*, certain language addressing high-capacity loops, dedicated transport, and mass market switching), and SBC Illinois is willing to delete that language from its contract proposal. There is no need to do so, however, as long as SBC (cont'd)

Second, XO objects to SBC Illinois' proposal to define dedicated transport to exclude transmission facilities between SBC Illinois' and XO's networks (SBC Ill. Section 3.5.1), and instead would vaguely define dedicated transport to include transmission facilities between SBC Illinois' switches, without indicating what that definition excludes (XO Section 3.5.2.1). As explained above under Issue SBC-5, XO's misleading definition is without merit, while SBC Illinois' proposed definition is precisely what is required by the *TRO.*

Third, XO proposes to effectively re-redefine entrance facilities as UNEs, by stating in Section 3.5.1 that XO may obtain dedicated transport "to connect the CLEC premises or Point of Presence (POP) with the SBC Illinois network." This proposed language is unlawful, and must be rejected. As explained above, the FCC redefined dedicated transport to *exclude* transmission links *"outside* the incumbent LEC's local network," including transmission links that "connect a competing carrier's network to the incumbent LEC's network." *TRO,* ¶ 366. This determination, the FCC held, "eliminates 'entrance facilities' as UNEs." *Id.* ¶ 366 n.1116. Not to be dissuaded, XO proposes a neat trick: it invents a new name for entrance facilities ("transmission facilities for interconnection and the exchange of traffic" or "interconnection trunk entrance facilities"), points out that the 1996 Act requires "interconnection" at cost-based rates, and asserts that SBC Illinois is thus required to provide these "interconnection trunk entrance facilities" at TELRIC-based rates. That is nonsense.

(… cont'd)

Illinois' proposed language limiting its obligation to provide unbundled access to network elements to only those specific elements that the FCC has found in valid and lawful rules must be unbundled is adopted (*see* Issues SBC-1 and SBC-2). If SBC Illinois' proposed "UNE declassification" language is not adopted, however, then SBC Illinois is unwilling to agree to, and would withdraw, language relating to dedicated transport that it originally proposed but which has been rendered outdated and superfluous by *USTA II.*

The 1996 Act requires ILECs to provide "interconnection" at cost-based rates. In particular, section 251(c)(2) requires an ILEC to "provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . at any technically feasible point within the carrier's network." 47 U.S.C. § 251(c)(2). But here XO is not requesting that SBC Illinois interconnect "the facilities and equipment of any requesting telecommunications carrier" (*i.e.*, XO's facilities). Rather, it is demanding that SBC Illinois "interconnect" its *own* facilities – *i.e.*, establish an interconnection point with SBC Illinois' network on one side, and an SBC Illinois "entrance facility" on the other. XO's proposal is contrary to the 1996 Act.

Section 251(c)(2), by its plain language, does not require ILECs to provide "transmission facilities for interconnection." It requires only "interconnection," which is defined, by a binding FCC rule, as "the linking of two networks for the mutual exchange of traffic. This term does *not include* the transport and termination of traffic." FCC Rule 5 (emphasis added). This definition, and section 251(c)(2) of the Act, do not include the physical transmission facilities a CLEC uses to interconnect or transport traffic to the interconnection point. Rather, section 251(c)(2) "refer[s] only the physical linking of networks." *First Report and Order*, ¶ 176. As the FCC explained, section 251(c)(2) provides CLECs "the right to *deliver traffic* terminating on an incumbent LEC's network at any technically feasible point on that network." *Id.* ¶ 209 (emphasis added). But the CLEC itself must "deliver [the] traffic" to the point of interconnection within the ILEC's network; it has no right to demand that the ILEC also provide the transmission facilities on the CLEC's side of the interconnection point, and deliver the traffic to the ILEC's own network for the CLEC.

Moreover, section 251(c)(2) of the Act (and the FCC's implementing rule, FCC Rule 305), expressly provides that an incumbent must provide interconnection with its network at any technically feasible point "*within*" the incumbent LEC's network. 47 U.S.C. § 251(c)(2). As the FCC held in the *TRO*, entrance facilities (and all facilities that "connect a competing carrier's network to the incumbent LEC's network") "exist *outside* the incumbent LEC's local network." *TRO*, ¶ 366 (emphasis in original). XO seeks to require SBC Illinois to provide an SBC Illinois facility that extends to "the CLEC premises or Point of Presence (POP)" – but that of course is not a point "within the incumbent LEC's network."

Fourth, XO opposes SBC Illinois' proposal to delete from the pricing schedule the prices for unbundled entrance facilities. XO's opposition is based on the assertion that SBC Illinois must still provide entrance facilities at TELRIC-based rates. As explained above, that assertion is without merit, and thus the Commission should approve SBC Illinois' proposed deletion.

Fifth, XO opposes some of SBC Illinois' proposed language regarding implementation of the *TRO*'s cap on DS3 dedicated transport circuits. SBC Ill. Section 3.5.2.2. In the *TRO*, the FCC promulgated a new rule that a CLEC "may obtain a maximum of 12 unbundled dedicated DS3 circuits for any single route for which dedicated DS3 transport is available as unbundled transport." FCC Rule 319(e)(2)(iii). Several of the disputes regarding implementation of this rule are identical to the disputes regarding implementation of the cap on DS3 loops, addressed in Issue SBC-3. In particular, XO, without explanation, opposes SBC Illinois' proposed language making clear that SBC Illinois (1) can reject any orders that violate the cap; (2) does not waive its ability to enforce the cap if it does accept an order violating the cap (*e.g.*, by mistake); and (3) can accept orders that violate the cap but convert the order. SBC Ill. Section 3.5.2.2. As explained under Issue SBC-3, SBC Illinois' proposed language reasonably translates the FCC's

new rule into the commercial environment, and will serve to reduce the potential for confusion and future disputes.

XO also proposes contract language that would allow it to obtain, for a single route, a maximum of 12 DS3 dedicated transport circuits "or DS3-equivalents (*e.g.*, 336 DS1s)." XO Section 3.5.2.2. That proposed language finds no support in the FCC's rules. FCC Rule 319(e)(2)(iii) specifies that a CLEC "may obtain a maximum of 12 unbundled dedicated DS3 circuits for any single route." It says nothing about "DS3-equivalents" or 336 DS1s. In short, XO's language does not implement anything in the *TRO*, and conflicts with the language of the FCC's DS3 cap rule, and thus should be rejected.

ISSUE SBC-7: Unbundled Local Switching and Shared Transport

Should the ICA include the *TRO*'s modifications to the rules regarding the provision of unbundled local switching and shared transport?

Issue SBC-7 concerns the provision of unbundled switching. In the *TRO*, the FCC promulgated new rules to govern the provision of unbundled switching. In particular, the FCC distinguished between switching used to serve "enterprise" customers and switching used to serve "mass market" customers, and performed separate impairment analyses, and created different rules, with respect to each. While XO did not raise any issue regarding unbundled switching in its arbitration petition (indicating that it did not wish to include language on this topic in the parties' contract), and has yet to identify any particular objection to SBC Illinois' proposed language, XO did subsequently include its own proposed language in the parties' joint issues matrix. XO's language should be rejected, and SBC Illinois' proposed language adopted,

because SBC Illinois' proposed language more accurately implements the *TRO*'s switching requirements.[31]

For instance, XO proposes to define "enterprise switching" as switching "used for the purpose of serving CLEC customers using DS1 or above capacity loops." XO Section 3.7.1.1. But that definition is incomplete. The FCC defined enterprise switching to *also* include switching used to serve some multiline *DS0* customers – in particular those multiline DS0 customers that are served by more than the "DS0 cutoff" number of DS0 loops. *TRO*, ¶ 497. The FCC held that "we define DS1 enterprise customers as those customers for which it is economically feasible for a competing carrier to provide voice service with its own switch using a DS1 or above loop. We determine that this includes all customers that are served by the competing carrier using a DS1 or above loop, *and all customers meeting the DS0 cutoff*." *Id.* ¶ 451 n.1376 (emphasis added). While no DS0 cutoff has yet been established for Illinois,[32] the parties' contract language must still reflect the FCC's definition of enterprise switching, as SBC Illinois' proposed language does. *See* SBC Ill. Sections 3.7.3.2, 3.7.3.5.

[31] As noted above, there is currently no FCC rule requiring unbundled access to mass market switching, because the D.C. Circuit vacated that rule. The "UNE declassification" language proposed by SBC Illinois is designed to accommodate that fact by restricting SBC Illinois' unbundling obligations to those network elements that the FCC says must be unbundled in valid, effective rules. The parties negotiated before the D.C. Circuit's mandate issued, and SBC Illinois proposed contract language which SBC Illinois now regards as outdated and superfluous (*i.e.*, certain language addressing high-capacity loops, dedicated transport, and mass market switching), and SBC Illinois is willing to delete that language from its contract proposal. There is no need to do so, however, as long as SBC Illinois' proposed language limiting its obligation to provide unbundled access to network elements to only those specific elements that the FCC has found in valid and lawful rules must be unbundled is adopted (*see* Issues SBC-1 and SBC-2). If SBC Illinois' proposed "UNE declassification" language is not adopted, however, then SBC Illinois is unwilling to agree to, and would withdraw, language relating to mass market switching that it originally proposed but which has been rendered outdated and superfluous by *USTA II*.

[32] SBC Illinois is not asking the Commission to actually establish a cut-off in this proceeding, and indeed there has not been testimony submitted to establish any such cut-off here. Nevertheless, the FCC's rules define enterprise and mass market customers based on the cut-off, and the parties' contract should thus reflect the FCC's definition, in the event a cut-off is established.

Moreover, XO's proposed definition of "mass market switching" (XO Section 3.7.1.3) must be rejected for the same reason. That definition improperly includes switching used to serve *all* DS0 customers, including those above the DS0 cutoff, which the FCC held are not mass market customers at all, but must be classified as enterprise customers. SBC Illinois' proposed language, on the other hand, properly defines mass market customers as those served by DS0 loops that are *not* enterprise customers (*i.e.*, that are not above the DS0 cutoff). SBC Ill. Section 3.7.2.2.

XO also proposes that the contract require SBC Illinois to continue to provide both enterprise and mass market switching at section 251 UNE rates, terms, and conditions, irrespective of whether those network elements are lawfully section 251 UNEs, pursuant to section 271. XO Sections 3.7.2, 3.7.2.1, 3.7.2.2. As SBC Illinois explained in connection with Issue SBC-1, XO's proposal is both unlawful and beyond this Commission's jurisdiction. Pursuant to the *TRO*, the determination of the rates, terms, and conditions for section 271 checklist items is a matter for the FCC under sections 201 and 202 of the 1934 Communications Act. And even if the Commission did have jurisdiction to address the issue, it would have to reject XO's proposed language as contrary to the 1996 Act and the *TRO*. In the *TRO*, the FCC unequivocally held that section 251 rates, terms, and conditions do not apply to section 271 checklist items. *TRO*, ¶¶ 655-59. And D.C. Circuit expressly upheld that determination in *USTA II*. 359 F.3d at 589. Thus, XO's proposed language must be rejected, and SBC Illinois' proposed language, which provides for the provision of unbundled switching only to the extent switching is lawfully a UNE pursuant to section 251 (*e.g.*, SBC Ill. Section 3.7.2.1), should be adopted.

XO's proposed language also violates federal law concerning the provision of unbundled enterprise switching. While the FCC held that enterprise switching is not subject to unbundling (and the D.C. Circuit upheld that determination), the FCC also created a mechanism for state commissions "to petition the [FCC] to waive the finding of no impairment," if the state commission first "undertak[es] a more granular analysis [of enterprise switching] utilizing the economic and operational criteria contained [in the *TRO* and FCC's rules]" and believes impairment exists. *TRO*, ¶ 455. XO proposes that "[d]uring the pendency of the state commission investigation and the FCC's resolution of the state commission's waiver petition, [SBC Illinois] shall continue to provide Enterprise Switching to CLEC." XO Section 3.7.2.2. That proposal violates the FCC's enterprise switching rules.

The FCC did *not* hold that its enterprise switching rules, which do not require unbundling, are somehow lifted whenever a state commission undertakes an investigation, or files a petition. To the contrary, FCC Rule 319(d)(3) states that ILECs are "*not required* to provide access to [enterprise switching] . . . *except where* the state commission petitions this Commission for a waiver of this finding in accordance with the conditions set forth in paragraph (d)(3)(i) of this section *and the Commission grants such waiver*." (Emphasis added.) Thus, SBC Illinois is required to provide unbundled access to enterprise switching only if the FCC actually *grants* a waiver of its finding of non-impairment. XO's language violates this FCC rule, and thus must be rejected. SBC Illinois' proposed language, on the other hand, accurately tracks FCC Rule 319(d)(3), and thus should be adopted. SBC Ill. Section 3.7.3.1.

XO's other proposed provisions governing enterprise switching also violate federal law. While the FCC conclusively held that CLECs are not impaired without access to enterprise switching, and promulgated a rule establishing that ILECs are "not required" to unbundle

enterprise switching (FCC Rule 319(d)(3)), and while the D.C. Circuit upheld that finding, noting that "the CLECs do not contradict the [FCC's] observation about the absence of evidence of impairment either nationwide or in specific markets" (*USTA II*, 359 F.3d at 587), XO simply fails to implement that new law. Instead, XO's language vaguely states that SBC Illinois must "provide CLEC with nondiscriminatory access to local circuit switching, including tandem switching, on an unbundled basis, in accordance with Applicable Law." XO Section 3.7.2. That language is insufficient and, to the extent it is intended to require SBC Illinois to continue to provide unbundled enterprise switching, unlawful. The FCC held that ILECs are not required to provide access to enterprise switching, and that law must be reflected in the parties' agreement. In particular, as SBC Illinois' proposed language states, SBC Illinois is required to provide unbundled access to enterprise switching only where the FCC has granted a waiver of its finding of non-impairment.[33] SBC Ill. Section 3.7.3.1.

Similarly, SBC Illinois' proposed language regarding mass market switching properly reflects current law, while XO's does not. There currently is no FCC rule requiring the unbundling of mass market switching, because that rule was vacated by the D.C. Circuit. SBC Illinois' proposed language properly accounts for this fact by requiring mass market switching only where it is a "Lawful UNE." SBC Ill. Section 3.7.2.1. XO's proposed language, on the other hand, ignores the D.C. Circuit's vacatur of the FCC's mass market switching rules, but

[33] XO's proposed transition language to apply in the event SBC Illinois is no longer obligated to provide unbundled access to enterprise switching (an event that occurred more than 8 months ago, on October 2, 2003) must also be rejected. XO Section 3.7.2.2. As explained above under Issue SBC-2, the purpose of the parties' negotiation and arbitration, pursuant to the FCC's direction in the *TRO*, is to provide for a transitional schedule *now*. XO's proposal to delay implementation of the FCC's new unbundling requirements by establishing an unlimited transitional schedule dependent upon even more negotiation and future Commission dispute resolution is unreasonable and contrary to public policy. *See TRO*, ¶ 705.

instead attempts to implement those vacated rules. XO Sections 3.7.2.3, 3.7.2.4. Thus, XO's language must be rejected.

XO also proposes an unlawful definition of "tandem switching." XO Section 3.7.1.6. XO proposes to define tandem switching simply as a "subset of local circuit switching network element that is required to be provided by the incumbent LEC on an unbundled basis." While tandem switching is a "subset of [the] local circuit switching network element," XO's suggestion that an ILEC is required to provide it on an unbundled basis, without qualification, is wrong. Pursuant to FCC Rule 319(d), an ILEC is required to provide tandem switching on an unbundled basis only where it is otherwise required to provide unbundled switching. For instance, because ILECs are no longer required to provide enterprise switching on an unbundled basis, they are no longer required to provide enterprise tandem switching (which is merely a subset of enterprise switching) on an unbundled basis. FCC Rule 319(d).

XO also unreasonably refuses to include in the contract any provisions implementing the FCC's new rules with respect to shared transport. The FCC held that "requesting carriers are impaired without access to unbundled shared transport *only* to the extent that we find they are impaired without access to unbundled switching." *TRO*, ¶ 534 (emphasis added). FCC Rule 319(d)(4) thus provides that ILECs are required to provide access to "shared transport facilities on an unbundled basis" only "to the extent that local circuit switching is required to be unbundled." Therefore, SBC Illinois' proposed contract language regarding shared transport, which provides that SBC Illinois is required to provide unbundled shared transport only where it is required to provide unbundled switching (or as required by the FCC's SBC-Ameritech merger order), is necessary to implement this new requirement, and should be adopted. SBC Ill. Section 3.8 (and subparts).

ISSUE SBC-8: Call-Related Databases

What terms and conditions should apply to call-related databases LIDB and CNAM, provided in conjunction with UNE-P?

Issue SBC-8 concerns the provision of call-related databases. The language to which XO objects is this: "Access to call-related databases LIDB [line information database] and CNAM [Caller Name with ID database], for SBC-Illinois will be provided as described in the following Appendices: LIDB and CNAM-AS, LIDB, and CNAM Queries." SBC Ill. Section 3.9.1. XO has not articulated any objection to this language, which merely specifies that SBC Illinois will provide access to LIDB and CNAM as provided for in the relevant appendices of the agreement, and SBC Illinois can discern none. SBC Illinois' language is reasonable and appropriate, and should be adopted.

Further, while XO did not originally designate this issue for arbitration, XO subsequently presented its own competing language for arbitration (in its response to SBC Illinois' response to the arbitration petition). XO's language should be rejected. XO proposes that SBC Illinois be required to continue providing call-related databases at sections 251 UNE rates, terms, and conditions as an obligation under section 271 of the Act. XO Sections 3.9.2.1, 3.9.2.2. As SBC Illinois explained previously, that proposal violates the FCC's holding that section 271 checklist items do *not* have to be provided on such terms, and, in any event, this Commission lacks jurisdiction to address the issue of section 271 rates, terms, and conditions.

ISSUE SBC-9: Signaling Networks

What terms and conditions should apply to SS7 provided in conjunction with UNE-P?

Issue SBC-9 concerns implementation of the *TRO*'s new requirements with respect to unbundled access to signaling networks. While in the *UNE Remand Order* the FCC had

concluded that CLECs are entitled to unbundled access to signaling networks, it modified that conclusion in the *TRO*. The FCC found that "competitive LECs are no longer impaired without access to such networks," except where the ILEC must "provide access to switching as a UNE," because "there are sufficient alternatives in the market." *TRO*, ¶ 544. Thus, except for where an ILEC must provide switching as a UNE, the FCC "reject[ed] the claims of competitive carriers that signaling networks should remain available as UNEs," and held that "we are no longer requiring incumbent LECs, pursuant to section 251(c)(3), to provide unbundled access to their switching networks." *Id.*, ¶¶ 546, 548. The FCC codified its new requirements in FCC Rule 319(d)(4)(i).

To implement this new FCC rule, SBC Illinois proposes language stating that it "will provide SS7 signaling on interswitch calls originating from a Lawful UNE ULS port," but that "[a]ll other use of SS7 signaling is pursuant to the applicable Access tariff." SBC Ill. Section 3.11.1. XO has not articulated its objection to this language, which is clearly necessary to implement the new requirements of the *TRO*, and thus SBC Illinois' proposed language should be adopted. The FCC held that CLECs are entitled to access signaling networks as a UNE only where an ILEC is required to provide switching as a UNE, and this holding must be reflected in the parties' *TRO* contract amendment.

While XO did not originally identify this as an issue for arbitration, XO subsequently presented competing contract language to govern the provision of unbundled access to signaling networks. XO's language is unlawful, and must be rejected. In particular, XO proposes that SBC Illinois be required to continue providing signaling networks at sections 251 UNE rates, terms, and conditions as an obligation under section 271 of the Act. XO Section 3.11.2.1. As SBC Illinois explained previously, that proposal violates the FCC's holding that section 271

checklist items do *not* have to be provided on such terms, and, in any event, this Commission lacks jurisdiction to address the issue of section 271 rates, terms, and conditions..

ISSUE SBC-10: Advanced Intelligent Network (AIN)

What terms and conditions should apply to the Advanced Intelligent Network (AIN) provided in conjunction with UNE-P?

Issue SBC-10 concerns implementation of the *TRO*'s new requirements with respect to unbundled access to the Advanced Intelligent Network ("AIN"). In the *TRO*, the FCC modified its rules regarding unbundled access to AIN. In the *UNE Remand Order*, the FCC had found that ILECs "were required to provide unbundled access to AIN platform and architecture," but not "AIN service software." *TRO*, ¶ 556. In the *TRO*, however, the FCC "conclude[d] that the market for AIN platform and architecture has matured since the [FCC] adopted the *UNE Remand Order* and we no longer find that competitive LECs are impaired without unbundled access to those databases." *Id.* Thus, the FCC "no longer require[s] incumbent LECs to unbundle access to the AIN databases for carriers not using the incumbent LEC's switching capabilities." *Id.* n.1724. The FCC codified this holding in FCC Rule 319(d)(4)(i).

To implement this new FCC rule, SBC Illinois proposes new contract language that states that the provisions of the agreement relating to the provision of AIN apply only when the CLEC is providing service using unbundled switching. SBC Ill. Section 3.12.1. XO has not articulated any objection to SBC Illinois' proposed language, which is clearly necessary to implement the new requirements of the *TRO*, and thus SBC Illinois' proposed language should be adopted.[34] .

[34] XO proposes language under SBC Issue-9 to the effect that SBC Illinois is required to provide unbundled access to all call-related databases (including AIN) on section 251 rates, terms, and conditions pursuant to section 271. XO Section 3.9.2.1. As SBC Illinois has explained, that proposal is both unlawful and beyond this Commission's jurisdiction.

ISSUE SBC-11: Tariffs

(a) Does the *TRO* provide that a CLEC may pick and choose between its ICA and any SBC Illinois tariff?

(b) Should the ICA terms and conditions, including those of the *TRO* Amendment, prevail over SBC's tariffs?

Issue SBC-11 concerns the interplay between the parties' *TRO* contract amendment and any SBC Illinois tariffs. (Cover amendment, section 1.) SBC Illinois' proposed language provides that the terms of the parties' binding contract apply notwithstanding any provisions of an SBC Illinois tariff. XO agrees with that language, but would add the phrase "unless, at CLEC's option, it orders from a SBC-13STATE tariff or SGAT." XO Cover amendment, section 1. In other words, the contract would apply, or not, at XO's sole option. XO's proposed language should be rejected.

Section 252(a)(1) of the 1996 Act provides that interconnection agreements for interconnection, services, or network elements are "binding." 47 U.S.C. § 252(a)(1). Moreover, one of the primary purposes of an interconnection agreement is to spell out the carriers' respective rights and obligations regarding interconnection and access to network elements, to provide commercial certainty to both parties. Allowing XO to "pick and choose" between provisions of its interconnection agreement and any tariff is contrary to both principles.

The Sixth Circuit has held that state commissions "administering the [1996 Act's] regulatory framework * * * must operate strictly within the confines of the statute." *GTE North, Inc. v. Strand*, 209 F.3d 909, 923 (6th Cir. 2000). And both the Sixth Circuit and the Commission itself recently have reaffirmed that interconnection agreements under Section 252 of the 1996 Act are the principal Congressionally-mandated vehicles for creating binding interconnection rights and obligations between incumbent and competing carriers.

In *Verizon North, Inc. v. Strand*, 367 F.3d 577, 582 (6th Cir. 2004) ("*Verizon II*"), the Sixth Circuit explained that Section 252 "describes the procedures for the negotiation, arbitration, and approval of interconnection agreements" and "establishes an intricate regulatory scheme with various burdens and responsibilities placed upon incumbents, competitors, and state regulatory commissions." And, as the Sixth Circuit earlier held in *Verizon North, Inc. v. Strand*, 309 F.3d 935, 940 (6th Cir. 2002) ("*Verizon I*"), those procedures constitute "the exclusive process required by the 1996 Act" and cannot be evaded through "other methods of achieving interconnection." *Verizon II*, 367 F.3d at 584. In short, carriers must "adhere to the federal statutory process" and may not turn to tariffs to vary or create the terms and conditions of their commercial relationship. *Id*. at 585; see also *Verizon I*, 309 F.3d at 940-41 (explaining that states are not "free to devise alternative methods under which competitors could acquire services and network elements from incumbents"). Accord *Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n*, 359 F.3d 493, 496-98 (7th Cir. 2004) (state commission may not enter standalone order dictating conditions on provision of local service outside "the process for interconnection agreements for local service under sections 251 and 252" of the 1996 Act); *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 442-45 (7th Cir. 2003) (state commission may not "create an alternative method by which a competitor can obtain interconnection rights" through tariffs outside the section 252 process).[35]

Here, XO seeks to bypass the detailed, comprehensive interconnection agreement scheme created by Congress by establishing a right to unilaterally evade its interconnection agreement

[35] XO's proposal that it be allowed to "pick and choose" between the terms of its agreement and the terms of a tariff is also directly contrary to the Commission's ruling that a CLEC "should not be permitted to purchase products or services from SBC's tariffs when they were already included in the ICA, unless [the CLEC] incorporates the tariff terms and all legitimately related terms and conditions into the ICA", something that XO has not proposed to do. *AT&T/SBC Illinois Arbitration Decision*, Docket 03-0239, p.15 (Aug. 26, 2003).

rights and obligations, in contravention of the Sixth and Seventh Circuit decisions cited above. The Commission should reject XO's proposal.[36]

Finally, nothing in the *TRO* establishes that CLECs have a right to pick and choose between provisions of their binding contract and a tariff. In short, XO's proposed language has nothing to do with the *TRO*, and finds no support anywhere in the *TRO*, and should be rejected.

ISSUE SBC-12: Effect of TRO Contract Amendment

(a) Should the Cover Amendment clarify how the terms and conditions of the amendment replace the terms and conditions of the underlying agreement?

(b) Should the Cover Amendment reserve both parties' rights with respect to "remedies and arguments with respect to any orders, decisions, legislation or proceedings"?

Issue SBC-12 concerns contract language related to the implementation and effect of the parties' *TRO*-related contract amendment. This language is necessary in order to give that amendment complete and proper effect. In particular, in order to fully and properly implement the *TRO* via a written contractual amendment, two practical questions (among others) must be answered: (1) what is the effect of the *TRO* contract amendment on the underlying existing interconnection agreement, including on conflicting terms (subissue 12(a))? and (2) by invoking the change of law process and entering into the *TRO* contract amendment, are the parties waiving their rights with respect to any *TRO*-related changes of law (or any other changes of law) that the

[36] The FCC recently issued an order eliminating its "pick and choose" rule under section 252(i), and instead requiring CLECs to take an "all or nothing" approach to opting into other interconnection agreements under section 252(i). Second Report and Order, *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, ¶ 1 (FCC rel. July 13, 2004). The FCC concluded that allowing CLECs to pick and choose between contract provisions "fails to promote the meaningful, give-and-take negotiations envisioned by the Act." *Id.* ¶ 10. The same holds true for allowing a carrier to pick and choose between contract and tariff provisions. SBC Illinois would have little incentive to "give" in negotiations when a CLEC could in essence renege on whatever it gives in return by instead opting to use a tariff provision.

parties did not incorporate into the agreement (subissue 12(b))? SBC Illinois' proposed contract language properly answers both these questions.

Subissue 12(a). With respect to the first question, SBC Illinois' proposed language provides guidance regarding how conflicting provisions between the original interconnection agreement and the *TRO* contract amendment are to be addressed. SBC Ill. Cover amendment, sections 2, 3. In such cases of conflict, the parties' *TRO* amendment should govern. XO agrees with this general principle, and agrees with SBC Illinois' language setting forth this general principle. XO does not agree, however, to additional sentences proposed by SBC Illinois setting forth examples of such potential conflicts, and explaining how those conflicts are to be resolved. XO asserts that this language is "confusing."

SBC Illinois disagrees. The first sentence states that "if the Agreement contains terms and conditions allowing the use of an unbundled network element, Lawful or otherwise, for any purpose, including, e.g., interconnection, those terms and conditions will be 'conflicting' with the terms and conditions in the Attachment that provides for the Declassification of such UNE (see, e.g., Section 1.3.4) or that provide that the UNE has already been Declassified." This means that if the *TRO* contract amendment provides for the "declassification" of a network element (*e.g.*, enterprise switching, which the FCC ruled is no longer a UNE), the terms and conditions of the *TRO* contract amendment governing that "declassified" facility trump the old terms and conditions regarding that UNE found in the original interconnection agreement.

The next sentence states that "if the Agreement contains terms and conditions allowing the use of an unbundled network element, Lawful or otherwise, for any purpose, including, e.g., interconnection, those terms and conditions will be 'conflicting' with the terms and conditions in the Attachment that provide that SBC-Illinois shall not be obligated to provide an unbundled

network element that is not or is no longer a Lawful UNE." SBC Ill. Cover amendment, section 2. This means that, if the parties' *TRO* contract amendment says SBC Illinois is not obligated to provide an element as a UNE because it is not lawfully a UNE, those provisions of the new contract amendment trump the old terms and conditions regarding that UNE found in the original interconnection agreement.

The next provision at issue states that "[t]he Parties agree that such replacement and/or modification [of the terms of the original agreement by the *TRO* contract amendment] shall be accomplished without the necessity of physically removing and replacing or modifying such language throughout the Agreement. By way of further example only, if a pricing schedule includes a UNE that is declassified or not Lawful pursuant to the terms and conditions of this Attachment, the inclusion of the UNE in the pricing schedule shall be of no effect and the UNE will not be available under the Agreement." SBC Ill. Cover amendment, section 3. This means that the fact that the parties have not gone through their original agreement to physically strike out the provisions to be superseded by the *TRO* amendment does not mean that all the provisions of the original agreement are still effective. For instance, if, pursuant to the *TRO* amendment, a particular network element is no longer a UNE, the fact that a UNE price for that element still physically appears in the original UNE pricing schedule of the original agreement does not mean that the element is still available as a UNE.

SBC Illinois submits that these contract provisions are not confusing at all, and should be adopted. These contract provisions are necessary to properly implement the *TRO*. They prevent a party from arguing that the superseded portions of the original interconnection agreement still apply because they physically appear in the agreement and have not been expressly identified as superseded. In other words, these contract provisions help ensure that the parties'

implementation of the *TRO* is given full effect, by preventing a party from pointing to superseded portions of the original agreement in an attempt to effectively nullify the *TRO* contract amendment.

Finally, SBC Illinois' proposed Cover amendment section 10 states that "[t]his Amendment shall not modify or extend the Effective Date or Term of the Agreement, but rather shall be coterminous with the underlying Agreement." This means that the effective term or date of the original, underlying interconnection agreement still controls, and is not modified by the parties' contract amendment. XO has not articulated any objection to this standard contract amendment provision.

Subissue 12(b). With respect to the second question, SBC Illinois' proposed language makes clear that by entering into the *TRO* contract amendment, neither XO nor SBC Illinois waives its rights with respect to "orders, decisions, legislation or proceedings and any remands thereof and any other federal or state regulatory, legislative or judicial action(s) . . . which the Parties have not yet fully incorporated into this Agreement or which may be the subject of further government review," including the *TRO* itself. SBC Ill. Cover amendment, section 11. This contract language, which protects the rights of both parties, is necessary in order to properly implement the requirements of the *TRO*. For instance, there may be requirements of the *TRO* which neither XO nor SBC Illinois chose to address in the parties' negotiations. SBC Illinois' proposed language makes clear that neither party is silently waiving its right to implement such additional *TRO* requirements in the future. The language also provides that neither party is waiving any rights with respect to future decisions.

XO has not explained its opposition to this non-waiver of rights language, which applies equally to both XO and SBC Illinois. SBC Illinois notes that interconnection agreements

commonly contain such provisions, and indeed XO itself has proposed non-waiver language in other provisions of the contract amendment. *See, e.g.*, XO Sections 1.5 and 1.6. Thus, SBC Illinois' proposed language should be adopted.

ISSUE SBC-13: What should happen if the TRO is stayed, reversed or vacated?

Issue SBC-13 concerns language clarifying what happens if the *TRO* is stayed, reversed or vacated. SBC Illinois proposes that if portions of the *TRO* are remanded to the FCC but *not* vacated, the provisions of the parties' agreement that relate to those remanded portions "shall remain in effect during the pendency of the remanded proceeding," unless those portions are otherwise "rendered invalid or are modified by a change of law event," in which case the parties' change of law provisions, or the declassification provisions if a UNE is declassified, will apply. SBC Ill. Cover amendment, section 5(b). XO opposes the "unless" portion of this language, and would instead freeze the portions of the contract relating to remanded portions of the *TRO*, regardless of other changes in law or the declassification of a UNE. That would be improper.

SBC Illinois agrees that, to the extent portions of the *TRO* are remanded but not vacated, the portions of the agreement relating to the remanded portions should remain in effect. But to the extent those portions are *otherwise* rendered invalid, or modified by a change of law event or UNE declassification, those latter events too must be given effect.

XO also proposes that "[i]n the event of a stay, or reversal and vacatur [of the *TRO*], CLEC shall purchase and access UNEs and related services in accordance with the terms of the Agreement and the remaining effective terms of this Amendment, and/or, at CLEC's option, SBC-13STATE's tariffs and SGATs." XO Cover amendment, section 5. In other words, XO proposes to (1) ignore the legal effect of a reversal and vacatur, (2) exempt a reversal and vacatur from any change of law process, (3) use a reversal and vacatur to give itself the right to

unilaterally choose which parts of the parties' agreement it will comply with and which it will not, and (4) use a reversal and vacatur to give itself a right to pick and choose between its agreement and any SBC Illinois tariff. This language is clearly unreasonable and inappropriate. To the extent a reversal and vacatur operates as a change in law, XO cannot unilaterally determine the effect of that change in law, including whether that change in law will be given any effect at all. Nor can XO use a reversal and vacatur to unilaterally determine which parts of the contract it will continue to comply with.

ISSUE SBC-14: Performance Measures

Should SBC Illinois be required to report on and pay performance measures when a UNE is declassified?

Issue SBC-14 concerns whether the performance measures plan previously adopted by the Commission to govern the provision of UNEs continues to apply to a facility that has been "declassified." SBC Illinois' proposed language provides that if a particular network element has been declassified or is no longer a lawful UNE, then "SBC Illinois will have no obligation to report on or pay remedies for any measures associated with such network element." SBC Ill. Cover amendment, section 7.

SBC Illinois' proposed language is necessary to address the practical consequences of network element declassification, including the *TRO*'s elimination of certain UNEs (like enterprise switching, OCn loops and transport, and entrance facilities). In this case, the practical consequence is that the performance plan established to govern the provision of UNEs cannot (by definition) apply to network elements that are no longer UNEs.

SBC Illinois' voluntary commitment to pay certain liquidated damages remedies based on the performance measures plan is limited to UNEs required by section 251 of the 1996 Act – as the applicable plan language makes clear. *See, e.g.*, SBC Tariff Ill. C.C. No. 20, Part 2,

Section 11, Sheet 1, ¶ 1.A ("This Section sets forth language dealing with the Performance Measurements for Unbundled Network Elements (UNES) . . . ."); *id.* ¶ 1.B.1 ("Performance Measurements are only available to telecommunications carriers purchasing unbundled network elements . . . ."). SBC Illinois has never agreed to pay remedies related to performance measures for network elements that are *not* section 251 UNEs. Thus, when SBC Illinois' obligation to unbundle a particular network element ceases, the contract should make clear that its obligation to measure, report and pay remedies on that particular element also cease.

XO's objection to SBC Illinois' proposed language is premised on the assertion that SBC Illinois must continue providing all the same network elements, at all the same rates, terms, and conditions, whether those network elements are section 251 UNEs or not, because of section 271. As explained above (Issue SBC-1), XO's assertion is without merit. The FCC explicitly held in the *TRO* that section 271 checklist items are *not* subject to the same rates, terms, and conditions as section 251 UNEs, and this Commission does not have jurisdiction to establish section 271 rates, terms and conditions. *TRO*, ¶¶ 655-59.

CONCLUSION

For the foregoing reasons, SBC Illinois urges the Commission to resolve the open issues in favor of SBC Illinois and to direct the parties to include in their Agreement the contract language proposed and endorsed by SBC Illinois.

July 19, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mark R. Ortlieb, an attorney, certify that a copy of the foregoing **SBC ILLINOIS' INITIAL BRIEF** was served on the parties on the attached service list by U.S. Mail and/or electronic transmission on July 19, 2004.

_____

Mark R. Ortlieb

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